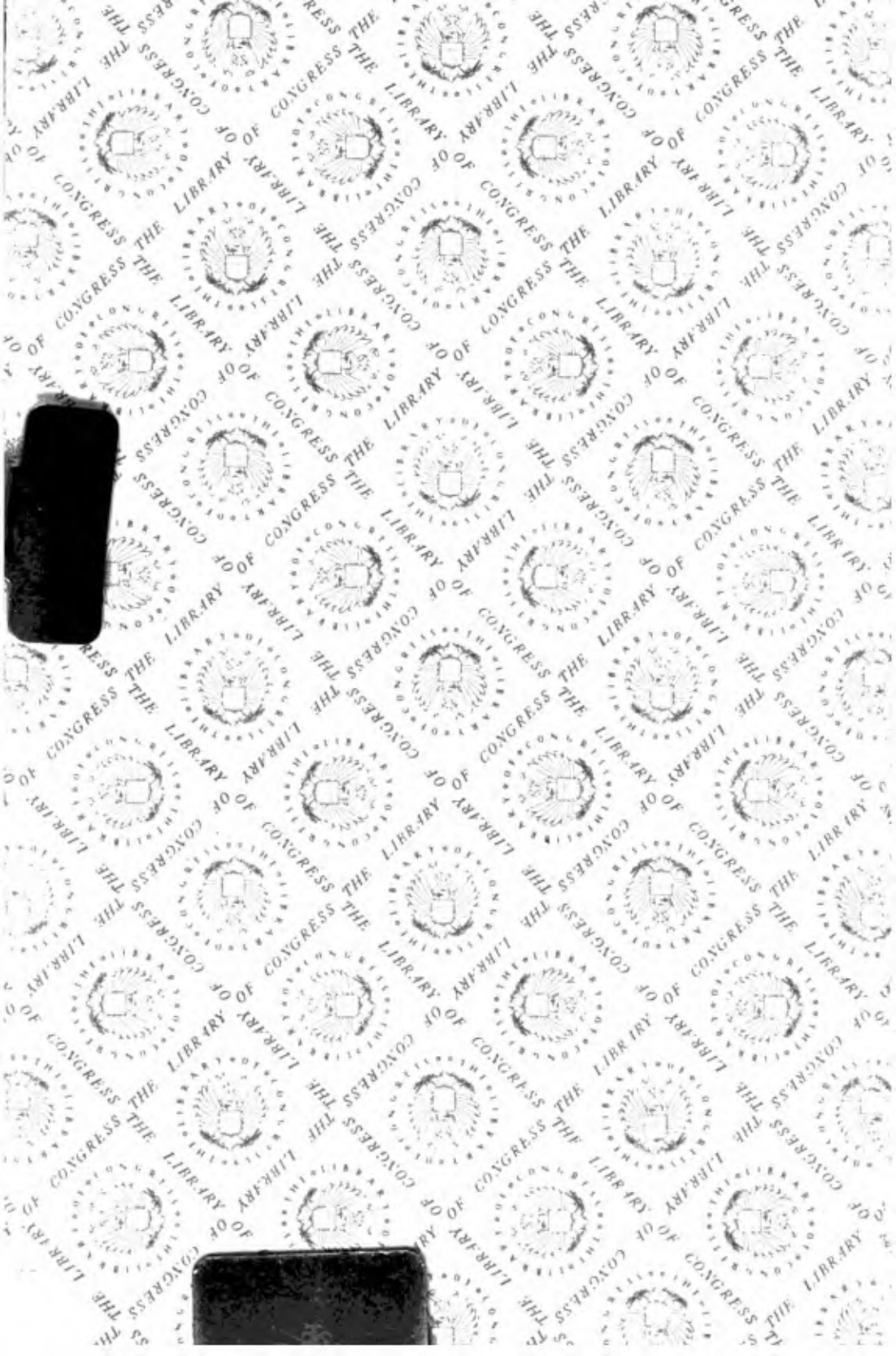

REVIEW OF FINALITY CLAUSES IN GOVERNMENT CONTRACTS

HEARINGS

BEFORE

SUBCOMMITTEE NO. 1

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

EIGHTY-THIRD CONGRESS

FIRST AND SECOND SESSIONS

ON

H. R. 1839 and S. 24

A BILL AND AN ACT TO PERMIT REVIEW OF DECISIONS OF GOVERNMENT CONTRACTING OFFICERS INVOLVING QUESTIONS OF FACT ARISING UNDER GOVERNMENT CONTRACTS IN CASES OTHER THAN THOSE IN WHICH FRAUD IS ALLEGED, AND FOR OTHER PURPOSES

H. R. 3634

A BILL TO AMEND TITLE 28 OF THE UNITED STATES CODE SO AS TO PROVIDE FOR A LIMITED JUDICIAL REVIEW OF DECISIONS OF FEDERAL OFFICERS UNDER "FINALITY CLAUSES" IN GOVERNMENT CONTRACTS

H. R. 6946

A BILL TO PERMIT REVIEW OF DECISIONS OF GOVERNMENT CONTRACTING OFFICERS INVOLVING QUESTIONS OF FACT ARISING UNDER GOVERNMENT CONTRACTS IN CASES OTHER THAN THOSE IN WHICH FRAUD IS ALLEGED, AND FOR OTHER PURPOSES

JULY 30, 1953, JANUARY 21 AND 22, 1954

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COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

EIGHTY-THIRD CONGRESS

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SUBCOMMITTEE NO. 1

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Second Session

Mr. GRAHAM, *Chairman*

Miss THOMPSON
Mr. HYDE
Mr. CELLER
Mr. WALTER

WILLIAM R. FOLEY, *Counsel*

Hon. Joseph R. Bryson, of South Carolina, a member of this committee, died on March 10, 1953.

Hon. Clifford P. Case, of New Jersey, a member of this committee, resigned from Congress on August 13, 1953.

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[1] Elected to committee March 30, 1953 (H. Res. 194).
[2] Elected to committee January 21, 1954 (H. Res. 412).

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REVIEW OF FINALITY CLAUSES IN GOVERNMENT CONTRACTS

THURSDAY, JULY 30, 1953

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 1 OF THE COMMITTEE ON THE JUDICIARY.
Washington, D. C.

The subcommittee met, pursuant to notice, at 10 a. m., in room 346, Old House Office Building, Hon. Louis E. Graham, chairman, presiding.

Present: Messrs. Graham, Hillings, Walter, Celler, and Miss Thompson.

Also present: Mr. William Foley, committee counsel.

The bills scheduled for hearings, H. R. 1839, H. R. 3634, and S. 24, are as follows:

[H. R. 1839, 83d Cong., 1st sess.]

A BILL To permit reviews of decisions of Government contracting officers involving questions of fact arising under Government contracts in cases other than those in which fraud is alleged, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no provision of any contract entered into by the United States, relating to the finality or conclusiveness, in a dispute involving a question arising under such contract, of any decision of an administrative official, representative, or board, shall be pleaded as limiting judicial review of any such decision to cases in which fraud by such official, representative, or board is alleged; and any such provision shall be void with respect to any such decision which the General Accounting Office or a court, having jurisdiction, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence.

SEC. 2. No Government contract shall contain a provision making final on a question of law the decision of an administrative official, representative, or board.

[H. R. 3634, 83d Cong., 1st sess.]

A BILL To amend title 28 of the United States Code so as to provide for a limited judicial review of decisions of Federal officers under "finality clauses" in Government contracts

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That chapter 91 of title 28 of the United States Code is amended by adding at the end thereof the following new section:

"§ 1506. Review of decisions under 'finality clauses' in Government contracts

"In any case in the Court of Claims or in any District court which is founded upon an express contract with the United States containing a provision purporting to make the decision of a Federal officer final and conclusive with respect to any dispute involving a question of fact arising under the contract, the court shall nevertheless decide the case without regard to any such decision which it finds was founded on fraud, or involved such gross mistake as necessarily implied bad faith, or was arbitrary or capricious.

"This section shall not apply with respect to any such decision which became final more than one year before the date of enactment of this section."

SEC. 2. The analysis of chapter 91 of title 28 of the United States Code is amended by adding at the end thereof the following:

"1506. Review of decisions under 'finality clauses' in Government contracts."

[S. 24, 83d Cong., 1st sess.]

AN ACT To permit review of decisions of Government contracting officers involving questions of fact arising under Government contracts in cases other than those in which fraud is alleged, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no provision of any contract entered into by the United States, relating to the finality or conclusiveness, in a dispute involving a question arising under such contract, of any decision of an administrative official, representative, or board, shall be pleaded as limiting judicial review of any such decision to cases in which fraud by such official, representative, or board is alleged; and any such provision shall be void with respect to any such decision which the General Accounting Office or a court, having jurisdiction, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence.

SEC. 2. No Government contract shall contain a provision making final on a question of law the decision of an administrative official, representative, or board.

Passed the Senate June 8, 1953.

Attest: J. MARK TRICE,
Secretary.

Mr. GRAHAM. The subcommittee will please be in order.

May I make an explanation to you so you may understand the pressure under which we are working today.

The administrative heads are seeking to wind up their affairs either tomorrow night or Saturday morning and our present subcommittee, subcommittee No. 1, is carrying the burden at the moment. I want to give you this full explanation so you may understand just what we are confronted with.

Today, it will be necessary for us to quit at 11 o'clock. The House meets at 11 o'clock. At that time, we call a Private Calendar and Consent Calendar which I must handle on the floor.

As soon as that is done, we take up what is known as the judges' bill which comes out of this committee.

As soon as we get that started, I must go to the Senate side for a conference on the immigration bill; and then we have to go before the Rules Committee later on in the day for another rule.

I got up this morning at 20 minutes of 3. I have been in my office since 10 minutes after 4. That is the way we are working, the pressure under which we are working.

So I may suggest to you at the start that wherever it is possible, if you will submit a statement, we will take it into consideration, of course, and there has been handed to me some things to be placed in the record. Then those who wish to amplify that by oral testimony, we will be glad to hear.

It is my understanding at the moment that there are both proponents and opponents and in the limited time we will try to hear as many on the one side as on the other so we can be absolutely fair on the matter.

The first witness is Mr. Elwyn L. Simmons, president of the J. L. Simmons Co., Inc.

Mr. McDANIEL. May I ask a question? Does the legislative plan call for a report on this bill?

Mr. GRAHAM. It is impossible. That would be impossible. If we go through with what we are to do it would be just out of the question unless it is continued over into next week. I do not know what the plans would be then. If it is continued next week, we might be able to reach it but under the present program, to quit tomorrow night or Saturday, it will be utterly impossible. But I did want to get the hearings started for you.

Mr. Foley has indicated that there will be subsequent hearings, but may I add one other thing? You understand our chairman, Mr. Reed, has been in the hospital. He has been out of here for 6 weeks. I have been carrying on in a dual capacity, trying to handle his work and the work that is before subcommittee No. 1. We hope Mr. Reed will soon be back. In the event that he does not get back for the scheduled hearings, then we will go ahead and have them some other time.

Mr. McDANIEL. I am one of those scheduled to testify against the bill today. My appearance was canceled because I was here in Washington. So I am banking on the fact that there will be a later opportunity to testify.

Mr. GRAHAM. There will be, I assure you.

All right, Mr. Simmons, come forward, please.

STATEMENT OF ELWYN L. SIMMONS, PRESIDENT, J. L. SIMMONS CO., INC., CONTRACTORS

Mr. SIMMONS. Mr. Chairman, ladies and gentlemen of the committee, my name is Elwyn L. Simmons. I am president of the J. L. Simmons Co., Inc., a Delaware corporation, with principal offices in Chicago, Ill., Indianapolis, Ind., Decatur and Springfield, Ill. Our firm is not among the largest contractors but we do operate intensively, I might say, in four States: Indiana, Ohio, Michigan, and Illinois. We build the average and sometimes larger schools, factories, commercial buildings. In the past, we have built heavier type of construction such as bridges, dams, railroads, airfields, and military cantonments. Over half of our work volume, however, except in wartime, has consisted of Government, Federal, State and local lump-sum contracts; awarded under wide open competition and to the lowest bidder that can find a qualified bondsman. This includes projects for all the usual Government agencies and administrative departments: War, Navy, Air Corps, Veterans' Administration, Federal Public Housing, and General Services Administration.

Operating for these agencies today, however, and since this Supreme Court pronouncement of its decision in the Wunderlich case, we realize that for the first time since the Court of Claims was organized in my grandfather's day over 80 years ago, that we are wholly at the mercy of these Government agencies and their department heads; and, especially so whenever we appeal to them for review and relief from an arbitrary decision by an incompetent, negligent, or capricious representative of that department or agency. This representative could be one that holds their own agency's express appointment and assignment to our work as a Government contracting representative and officer.

You can appreciate the feeling of helplessness, and even mockery, that now exists in our minds on this Government work whenever we realize that under terms of the usual standard Government form of contract, No. 23, or similar contracts, we must promptly execute all duly authorized changes regardless of size, regardless of scope or kind or character, and regardless of the conditions of the work; that this contracting officer in his sole discretion may direct.

This helplessness is greatly magnified by the contractor's realization that under these same standard contract provisions for changes in the work, our only hope for remuneration is dependent on this contract's provision for a so-called equitable adjustment.

Mr. GRAHAM. May I interrupt you for a moment, please?

(Discussion off the record.)

Mr. SIMMONS. Furthermore, this adjustment is to be determined by the same contracting officer and his department head that heretofore has perhaps rejected our actual cost record and then unilaterally proceeded to establish in a wholly arbitrary manner an inadequate sum that could be based on his own alleged finding of fact.

When this contractor resists, he is bluntly reminded that any court of appeal, under present circumstances after this Wunderlich decision on this question of fact, is now ruled out by that decision.

Bear in mind that the same Government standard form, 23, including this disputes clause, states that not only shall this department head's decision be final and conclusive upon the parties thereto; but that same clause ends with the most mandatory of all contract sentences; "in the meantime the contractor shall diligently proceed with the work as directed."

Remember also that this Wunderlich decision when applied to this standard Government contract form can, whenever officered by an incompetent or negligent or capricious agency representative, also work as readily against the Government's interests as against that of the contractor.

Remember, that the extensions of time as well as the adjustments of our dollar sums, affecting penalties for unwarranted delays and settlements for changes in quantities and scope or character of the work, that are provided by this contract and for which relief can now be arbitrarily granted or withheld from the contractor, by the contracting officer's decision, can only be based on that officer's own findings of facts.

Such findings are now without any safeguard of appeal by either party to the courts. There is no present provision in the statutes for judicial interpretation or judgment as to the merits and application of those contracting officers' so-called facts.

Remember the arbitrary concept of the Government officer's prerogative under present contract provisions, that has now been interpreted by the Supreme Court as both final and conclusive on the facts, could next week be extended by supplementary contract provisions to cover all questions of law and thereby completely remove all questions of both fact and law from right to a judicial decision.

Remember, only your immediate legislative action through enactment of H. R. 1839 or S. 24 can now protect both the Government and the contractor from this constantly recurring and devastating effect of this unprecedented situation.

Justice Douglas' remarks with Justice Reed's concurrence were quoted. The rule, to quote:

> The rule we announced has wide application and a devastating effect. It makes a tyrant out of every contracting officer. It has the power of life and death over private business, even though his decision is grossly erroneous.
> We should allow the Court of Claims, the agency close to these disputes, to reverse an official whose conduct is plainly out of bounds—

said Justice Douglas.

> Whether he is fraudulent, captious, or just palpably wrong—

to continue the quotes of Justice Douglas—

> the rule we announce makes Government oppressive.

The rule of the Court of Claims gives a citizen justice even against his Government.

Justice Jackson also stated in part:

> It should not follow that one who takes a public contract puts himself wholly in the power of the contracting officers and department heads. I still believe one should be allowed to have a judicial hearing before his business can be destroyed by administrative action.

You can appreciate our situation as contractors when we find that there are possibly those that can't see the light of this situation.

I understand from review of the printed record in the debates on S. 24 in the Senate 3 months ago and immediately prior to its unanimous passage by the Senate that there was some objection by contractors doing business with the Air Force to the inclusion of the GAO under the provisions of this bill. I do not know what basis these Air Force contractors have for their objection, but we as general contractors are used to the GAO in our business and their auditing staff and forms no basis for our objection.

I thank you.

Mr. GRAHAM. Now may I make a suggestion? Is there anybody here in opposition? Mr. Simmons has testified in favor of the bill; is anybody opposed to the bill?

(NOTE.—The prepared statement of Mr. Simmons is as follows:)

STATEMENT OF ELWYN L. SIMMONS, PRESIDENT OF THE J. L. SIMMONS CO., INC., CONTRACTORS

My name is Elwyn L. Simmons. I appear before you as president of the J. L. Simmons Co., Inc., with principal offices in Chicago, Springfield, and Decatur, Ill., and Indianapolis, Ind., seeking legislative relief from the interpretation placed on the "disputes clause" of the standard form of Government contract by the Supreme Court of the United States in its Wunderlich decision of November 26, 1951. My firm has been in the contracting business for over 100 years, during which period we, as general contractors, have completed numerous projects for the United States Government.

Except during the war years, this Government work has always been obtained as a result of competitive bidding, and the contracts entered into have been on United States Government form of contract No. 23, or the equivalent thereof. This form contains the usual Government disputes clause which reserves to the contracting officers of the various Government agencies and their department heads the right to make a final determination of all questions of fact. This provision is obviously most unjust and inequitable since it confers this exclusive and final right of decision on all disputed questions of fact upon the representatives of one of the interested parties, without judicial review except where fraud can be proven. Such persons, as representatives of the Government, are naturally prejudiced in favor of the Government which is one of the parties to the contract.

These Government employees are therefore unqualified to make judicious decisions for the following reasons:

(1) They have a natural bias toward their employer who is the very same party that drafted the contract, plans, and specifications for the work in connection with which the dispute arises, and the very same party under whose instructions and direction this work is actually performed.

(2) They represent the Government agency responsible for the script of the specifications and the many notations and details relating to the plans, as well as the usual instructions and correspondence issued during the construction period of the contract. They therefore represent the very party to the contract that is responsible for the vague and ambiguous terms that one so frequently finds in even the most carefully prepared documents and which are directly involved in the dispute with respect to which they are now given exclusive and final power of decision.

(3) They represent the Government agency that is in sole charge of the work and is directing its performance during the entire construction period of the contract.

Under these circumstances the decisions rendered by the contracting officers of the various Government agencies on disputed questions of fact are ofttimes unjust, inequitable, arbitrary, capricious, or so grossly erroneous and so mistaken as necessarily to imply bad faith; or, they are not supported by reliable, probative, and substantial evidence. Failing to obtain relief on appeal to the head of the department, the contractor has heretofore either accepted the decision or sought relief by legal action in the Court of Claims. This relief is now denied the contractor by the Wunderlich decision, except where fraud on the part of the contracting officers can be proven. In other words, prior to the decision of the United States Supreme Court in this case, the Court of Claims has reviewed administrative decisions of the contracting officers in cases where those decisions were arbitrary, capricious, or so grossly erroneous as to imply bad faith, as well as in cases where they were frauduient. Since the Wunderlich decision, however, it is necessary for the contractor to actually prove fraud in order to obtain judicial review of any adverse administrative decisions rendered on questions of fact.

We frankly have never had an experience in which we felt that the contracting officer's decision was based on fraud. There have, however, been numerous administrative decisions by representatives of Government agencies which have been arbitrary, capricious, or grossly erroneous and not supported by substantial evidence. These decisions are all obviously unjust and inequitable. They can be most costly and even disastrous to the contractor. Therefore, the contractor is most certainly entitled to a review by the Court of Claims in such cases even though frauduient action cannot be proven.

In fairness to all contractors and others engaged in construction as well as those engaged in other work for the United States Government, I urge an early and favorable report on the remedial legislation presently before you in this session of Congress to correct the inequities of this grossly unjust situation that has resulted from the Wunderlich decision of the Supreme Court of the United States rendered on November 26, 1951. In this decision Justice Minton's majority opinion expressly recommended remedial legislation by the Congress.

Mr. HINES. In view of the apparent fact that hearings will be held at a later time, I would be happy to postpone my appearance until such later time to enable the subcommittee to get on with the other pressing business I understand they have today.

Mr. GRAHAM. If it is satisfactory with you, all right, but I wanted to accord each side an opportunity to be heard.

Mr. HINES. I appreciate your courtesy in extending the opportunity, sir, but we would be perfectly satisfied to postpone our testimony until such later time—until there are additional hearings.

Mr. HILLINGS. Mr. Hines, you are from the Douglas Aircraft Co. or the Aircraft Industry Association of America?

Mr. HINES. Yes, from Douglas Aircraft, of Santa Monica.

Mr. HILLINGS. In view of the fact that you have come a long distance, if you have anything you would like to add we want you to know that you could certainly do so.

Mr. GRAHAM. Mr. Springer, a Member of the House.

Mr. SPRINGER. I call this to the attention of the subcommittee. I am the chairman of a subcommittee which is now in session down the hall which I have given over to another person pending the time I could come here and testify. He must leave by a quarter to 11, which is roughly 30 minutes. There are only two who are there and able to hear on this subcommittee besides myself this morning. I do not want to disrupt the subcommittee. I beg their indulgence if they could hear me in order for me to get back to that subcommittee.

Mr. GRAHAM. In view of the fact that you are here every day, the committee will be glad to hear you at any time when we hold further hearings.

Mr. SPRINGER. That will be agreeable with me.

Mr. GRAHAM. Therefore, if you have no objection, that arrangement will permit you to get back to your committee and will at the same time make it possible for us to hear some of these witnesses who have come from distant places at some inconvenience to themselves, I am sure.

Mr. SPRINGER. Thank you, Mr. Chairman.

Mr. GRAHAM. We will hear now from Mr. George Leonard, representing the Wunderlich Contracting Co.

Come forward, please, sir.

STATEMENT OF GEORGE P. LEONARD, WUNDERLICH CONTRACTING CO.

Mr. LEONARD. I am George Leonard, of Los Altos, Calif., vice president of the Wunderlich Contracting Co. It was a predecessor of ours of which I was general manager that was involved in the so-called Wunderlich Co. whose case was before the Supreme Court. I personally handled that claim for Martin Wunderlich Co., and I am thoroughly familiar with it. And it was, in my opinion, a very gross injustice. We had signed a contract with the Government to construct a dam in southwestern Colorado which had a provision in it that, if the Government made any changes, an equitable adjustment under the contract would be made. We attempted to get an equitable adjustment from the contracting officer, but he did not give it to us, and we went to the Court of Claims, and the Court of Claims agreed with us that the contracting officer, and I quote, "had been arbitrary, capricious, and grossly erroneous and by so doing had deprived us of our rights under the contract to an equitable adjustment."

We should have received the money which the Court of Claims awarded to us, and it was only because the Supreme Court, in my opinion, and in the opinion of most attorneys to whom I have talked, that the Supreme Court came out with some very bad law. And we have been under the impression, both during the last session of Congress and this one that something would be done to correct this very inequitable situation that exists at the present time.

Currently, neither the Government through the GAO, nor the contractors through the courts, have any right to appeal from contracting officers' decisions even though they may be grossly erroneous as they were in this case. I, of course, am thoroughly familiar with the facts of the case. I think it would be too involved to bring out

those facts to you, but let me assure that they are grossly erroneous. The Bureau of Reclamation, through its own testimony, admitted that it had made an erroneous application of their own rental rates in our case and it was because of those admissions that the Court of Claims has justly held that we were entitled to these funds.

I suspect that if there is anybody in opposition to this bill today it is because they have something to hide, and I say that to the opposition now. And I would like very much to have the opposition come out and make themselves known. I can see no reason why anybody should object to either the General Accounting Office or the courts passing on these decisions of the contracting officers.

Now, some objection, I think, has been raised that perhaps changing of this bill would flood the courts. If this H. R. 1839 goes through, it will simply reinstate the situation that existed before this bad Wunderlich decision in the Supreme Court. I think if the contracting officers are put on notice that their actions may be reviewed by the courts and by the General Accounting Office, then they will be very careful in handing down their decisions and we would not have a flood of legislation.

As a matter of fact, I think the situation would be much better.

I understand that the General Services Administration has said that they would change the contract form so as to eliminate the provision as it now stands. That would certainly not be good enough because there are a lot of contractors who have taken on work during the past few years expecting to get equitable treatment as their contracts say and those people would be left out in the cold in an appeal to the courts.

If H. R. 1839 or some similar bill is not passed by Congress, contractors have no alternative but to add a sizable contingency to their bids on Government work. We have not been doing that at the present time because we have been led to believe that some corrective legislation would go through.

Mr. GRAHAM. Who led you to believe that?

Mr. LEONARD. The Senate passed a bill.

Mr. GRAHAM. Who led you to believe that?

Mr. LEONARD. The Associated General Contractors have assured us that they thought some legislation would almost certainly come through and certainly there should be no objection from either branch of Congress to giving a contractor his day in court.

Mr. GRAHAM. You have not answered my question. I asked you who led you to believe that?

Mr. LEONARD. I told you that the Associated General Contractors have said that they thought some corrective legislation would go through. The Senate has passed a bill.

Mr. GRAHAM. What I am getting at is your extravagant claims. Limit yourself to facts. You give us the facts; we will act on them.

Mr. LEONARD. Congressman, I say we have been led to believe from several sources that some corrective legislation would go through.

Mr. GRAHAM. Proceed.

Mr. LEONARD. That is still my position. I do not think it is an extravagant claim. When the Senate bill passed the last time and this time, and the House of Representatives assured us, the Judiciary Committee in the last Congress told us, that they were not going to hold hearings because they were going to accept the recommendations

of the Senate committee and use that as the basis of their report, I would say that we were led to believe that some corrective legislation would come through; and I think it is necessary.

A contractor is certainly entitled to his day in court. He should not be subjected to the whims of arbitrary, capricious, and grossly erroneous contracting officers. And I think that some corrective legislation is absolutely essential, and I say again that those people who are in opposition to this bill must have something to hide and I personally would like to know who they are and why they are objecting to the bill; and I would like to hear this morning if it is possible.

My understanding is that this bill simply reinstates to the General Accounting Office the authority which it had under the General Accounting Office bill and which was taken away from them by the Supreme Court and of course the——

Mr. CELLER. That language impugns the integrity of those who might happen to have views opposite to your own. Do you think it is fair to state——

Mr. LEONARD. I think it is, sir.

Mr. CELLER. It is rather a strong statement.

Mr. LEONARD. It is, sir, but this is a strong situation, and I want you to know that we have been grossly harmed by this bad Wunderlich decision of the Supreme Court, and I can't understand why there would be opposition to it.

Mr. CELLER. You do not say that the Court itself has something to hide?

Mr. LEONARD. I do not say that the Court has anything to hide. I am talking about the opposition to this bill.

Mr. CELLER. You do not have any specific facts that you can make in support of that statement, do you?

Mr. LEONARD. No, I do not; but I want to know what the opposition is because I cannot see why anybody would object to having contracting officers' decisions subject to audit by the Court of Claims or subject to going to court. What possible objection could there be to that?

Mr. CELLER. Are you asking me or the committee?

Mr. LEONARD. I am anxious to hear the answer from the opposition.

Mr. GRAHAM. Well, we have afforded the opposition an opportunity to be heard this morning, but they preferred to defer that to some subsequent date.

Mr. LEONARD. Frankly, I think they prefer to hide, Congressman.

Mr. GRAHAM. I resent that. I think that is an utterly unfair statement or charge for you to make. We are not here passing on your claims or anybody else's. We are trying to do justice, and as chairman of this committee I resent it.

Mr. LEONARD. I am sorry, then; I apologize. I don't——

Mr. GRAHAM. I don't know who these people are or anything about this but you cannot make all kinds of charges.

Mr. LEONARD. I make no charges against the committee, sir.

Mr. GRAHAM. You have charged the other people with bad faith. We have never had a witness like you come in here and with the attitude you have come in. I want you to know this.

Mr. LEONARD. I am sorry if I have offended anybody.

Mr. GRAHAM. I resent it very much.

Is that all with you?

Mr. LEONARD. Yes, sir.
Mr. GRAHAM. Then we will take the next one.
Mr. Hines said he preferred to be heard at a later date.
(The prepared statement of Mr. Leonard follows:)

STATEMENT OF GEORGE P. LEONARD

I am George P. Leonard, vice president of the Wunderlich Contracting Co., a heavy construction contractor doing extensive Government work. Formerly, I was general manager of the Martin Wunderlich Co. which was the company involved in the Wunderlich decision.

I personally handled the claim which finally resulted in the Supreme Court decision, and that decision was contrary to all that we had understood to be the existing law and was, in our opinion, a grave injustice and a serious blow to our company after approximately 10 years of effort on our part to get equitable treatment under our contract.

The Supreme Court has, in effect, said that no matter how arbitrary, capricious and grossly erroneous a Government contracting officer's decisions may be, neither the Government nor the contractor can overcome his decisions on questions of fact. That, obviously, is an intolerable situation and one which Congress should correct immediately. In all that has been said and written about the Wunderlich decision, no one has urged that Government contracting officers should have the right to make arbitrary, capricious or grossly erroneous decisions. The majority opinion on the Supreme Court stated that it was up to Congress to correct the situation and the minority opinion clearly and forcefully pointed out the dangers in the present situation.

The United States Court of Claims in the Wunderlich case after extensive testimony, evidence, and deliberation held that the decisions of both the contracting officer and the head of the department had been "arbitrary, capricious and grossly erroneous." The Supreme Court says, in effect, "So what?"—and by so doing deprived the contractor of a considerable sum of money to which he was entitled under his contract. Surely this situation should be corrected before other injustices are done to Government contractors by contracting officers who may be, under present circumstances, as arbitrary, capricious, and grossly erroneous as they wish. And they have been so advised by the highest court in the land.

Contractors are reluctant to go into the Court of Claims unless they are grossly wronged. It is a costly and time-consuming process to litigate a dispute under a Government contract. It is usually in their best interest to accept a decision and go about their established business. They should not, however, be deprived of their right to enter court and obtain equitable treatment by grossly erroneous decisions of the other party to the contract. The case in question was the first time in approximately 20 years of business that the Wunderlich organization had gone to the Court of Claims.

Under the Wunderlich decision, a Government contractor enters into the settlement of a dispute with his hands tied behind his back. If, as it now stands, a contracting officer need never answer for his erroneous decisions, any effort at settlement may be nothing but a mockery. That is not right; it is not just; it is certainly not the American way.

The Wunderlich decision involved a question of fact, but it is easy for a contracting officer, by an erroneous decision on a question of fact, to deprive a Government contractor of his legal rights as well. And whether based on fact or law, an injustice is still an injustice. It is ridiculous for the United States to bemoan the sad fate of the citizens of totalitarian countries around the world and openly subject its own citizens to the whims of arbitrary, capricious, and grossly eerroneous contracting officers. Only Congress can help and I urgently request that you take action at this session by passing H. R. 1839. Then, both the Government and the contractor could have their day in court.

Unless the contractor can be assured of equitable treatment, he has no alternative but to charge the Government an extra price for this contingency. And in exchange all the Government would get for this extra cost would be the right for its contracting officers to be arbitrary, capricious, and grossly erroneous. As a taxpayer, I would regard that as money wasted.

The vast majority of contracting officers are honest and fair to both the Government and the contractor, and it is now up to the House of Representatives to serve notice on the small minority that they must be likewise or answer to same impartial tribunal of our Government.

Mr. GRAHAM. Then we will take the next one, Mr. Ruddiman, of King & King. Is he here?

Mr. RUDDIMAN. Yes, sir.

Mr. GRAHAM. We will hear you.

STATEMENT OF HARRY D. RUDDIMAN, REPRESENTING CERTAIN CONTRACTORS

Mr. RUDDIMAN. Mr. Chairman, my name is Harry D. Ruddiman. I am a resident of Bethesda, Md. I am a member of a firm which for many years has represented construction contractors before the Federal contracting agencies and the courts. I also have the doubtful distinction of having won the Wunderlich case in the Court of Claims and having lost it in the Supreme Court.

Mr. GRAHAM. You got a 50–50 break.

Mr. RUDDIMAN. That is right, sir.

I have already submitted copies of my written statement and I request that that statement be made part of the record.

Mr. GRAHAM. That will be done.

(The statement referred to is as follows:)

STATEMENT OF HARRY D. RUDDIMAN

SUMMARY OF CONTENTS

I am a resident of Bethesda, Md., and am a member of the firm of King & King, Washington, D. C., which for many years has represented contractors before the Government contracting agencies and the Federal courts in the prosecution of claims against the United States. I also represented the contractor in the Wunderlich case.

1. In the Wunderlich case (342 U. S. 98) the Supreme Court held that under the standard Government contract disputes clause a department head's decision may not be set aside even though it is arbitrary, capricious, and grossly erroneous, and may only be set aside upon proof of fraud which it defined as "conscious wrongdoing, an intention to cheat or be dishonest."

As appears from the hearings on S. 2487, 82d Congress, this decision was generally regarded as a radical departure from the law as it existed prior thereto. Among others who testified to that effect were representatives of the General Accounting Office and the Department of Defense.

In any event, we are now faced with the Wunderlich rule which, for all practical purposes, does away with judicial review of administrative decisions under the disputes clause. It appears no longer possible to base such a review on the grossly erroneous character of the administrative decision itself since the law now requires an intent to cheat or be dishonest. A grossly erroneous decision may result from any number of causes falling short of such an intent. It may result, for example, from the contracting officer's inability to devote adequate time to a study of the question, or from faulty information supplied by subordinates.

2. We have, then, a situation which urgently requires correction of the type contained in S. 24 or H. R. 1839.

Without such correction Government contractors are left to the mercy of a representative of the other contracting party and are deprived of an effective day in court to review his decision. Along this line I cannot recall a single

decision of the Court of Claims or of the Supreme Court setting aside a contracting officer's decision which did so on the basis of an intent to cheat or be dishonest. Where the Court of Claims has set aside an administrative decision it has done so on grounds short of fraudulent intent. See, for example, cases cited infra, pages 4 and 5.

Without correction of the present situation, not only the contractor but also the Government, will be unable to obtain effective judicial review of contracting officers' decisions no matter how unfair or erroneous they may be.

Moreover, the present situation unless corrected, will inevitably lead to higher prices on Government work. Responsible contractors will either have to forego bidding on Government work, thus reducing the field of competition, or include large contingencies in their bids to cover the risk of arbitrary, capricious, or grossly erroneous decisions.

For all these reasons, the need for correction of the existing situation is clear. The Supreme Court itself has pointed out the method, i. e., by legislation. The Senate has responded by passing S. 24. The chairman of this committee has introduced H. R. 1839, which is identical with S. 24 as it passed the Senate. This bill would restore to the courts an effective review of determinations made by contracting officers and I strongly urge that it be enacted.

3. I understand that the General Services Administration, in recognition of the urgent need for correction, is changing the staadard form disputes clause so as to permit a greater measure of court review. In my opinion this, while a step in the right direction, is not an adequate aaswer to the problem. First, there is nothing to prevent the General Services Administration from again reverting to the old form of disputes clause. Second, there appears to be considerable doubt whether that agency has authority to adopt a form of contract which all contracting agencies would be required to use. Third, it is my understanding that the revised disputes clause relates only to disputed questions of fact. Thus, under the decision of the Supreme Court in *United States* v. *Moorman* (338 U. S. 457), there would be nothing to prevent a specification writer from including in the contract specifications a clause making the contracting officer's decision final on questions of law, thereby depriving the courts of review of such questions in the absence of fraudulent intent. Lastly, such measures afford no remedy to contractors who entered into contracts prior to the Wunderlich decision and who, of all persons, are most deservingly entitled to a correction of the situation brought about by the Wunderlich decision.

4. It was pointed out in the hearings last year in the Senate that appellate boards had been set up by some of the contracting agencies which afforded a contractor a hearing and an opportunity to present witnesses in an effort to obtain reversal of a contracting officer's decision. However, I do not suppose that anyone would seriously urge that such boards, composed of employees of the contracting agency, are an adequate substitute for an effective, impartial review by the courts. It would be just as fair and impartial as trying the appeal before a jury composed exclusively of employees of the contractor.

Moreover, the practice of setting up such appellate boards is by no means universal. No such practice, for example, exists in connection with contracts of the Bureau of Reclamation which enters into hundreds of millions of dollars worth of contracts each year.

Further, in some instances, these appellate boards conduct hearings at which the contractor produces his witnesses but none are produced by the Government, the board, in arriving at its decision or recommendation, apparently taking into account ex parte statements by the very official from whose decision the appeal was taken. Thus the contractor, while subjected to cross-examination, is prevented from making any cross-examination himself.

It is thus clear that the appellate boards are no substitute for an effective judicial review.

5. In the Senate hearings last year it was asserted that corrective legislation would flood the courts with litigation. Such fears are groundless. In a review of the Court of Claims' decisions for the 15 years preceding the Wunderlich decision, I have found only 16 cases in which the court set aside a determination of an administrative officer authorized to make a final decision pursuant to the standard disputes clause or similar provision. (*Ambursen Dam Co.* v. *United States* (86 C. Cls. 478) ; *H. B. Nelson Construction Co.* v. *United States* (87 C. Cls. 375) ; *Callahan Construction Co.* v. *United States* (91 C. Cls 538) ; *Baruch Corporation* v. *United States* (92 C. Cls. 571) ; *Hirsch* v. *United States* (94 C. Cls. 602) ; *Ruff* v. *United States* (96 C. Cls. 148) ; *Langevin* v. *United States* (100 C. Cls. 15) ;

Needles v. *United States* (101 C. Cls. 535); *Bein* v. *United States* (101 C. Cls. 144); *Henry Ericcson Co.* v. *United States* (104 C. Cls. 397); *De Armas* v. *United States* (108 C. Cls. 436); *Loftis* v. *United States* (110 C. Cls. 551); *Joseph Meltzer, Inc.* v. *United States* (111 C. Cls. 389); *Great Lakes Dredge and Docks Co.* v. *United States* (116 C. Cls. 679 and 119 C. Cls. 504); *Newhall-Herkner* v. *United States* (116 C. Cls. 419); and *Penner Installation Co.* v. *United States* (116 C. Cls. 550).

In all of the above cases the administrative determination was set aside on a ground short of an intent to cheat or to be dishonest. The several grounds relied upon were that the decision was "grossly erroneous"; or had no "substantial evidence to support it"; or was "unreasonable and must be set aside as arbitrary"; or was "arbitrary and unreasonable"; or resulted from "unawareness of the problems on the part of the deciding officer"; or was an "arbitrary action"; or had "no reasonable basis in the facts or contract documents," was "not supported by the findings made or by substantial evidence," and "did not meet the legal standard of good faith required by * * * the contract of one called upon to make an impartial decision"; or was "arbitrary and so grossly erroneous as to imply bad faith." The Court has also pointed out that the last-mentioned ground does not involve any question of actual dishonesty, but means only that the deciding officer failed to act as an impartial, unbiased arbitrator. See the Needles, Penner, and Great Lakes cases cited above.

I have also been able to find for the same 15-year period prior to the Wunderlich decision, 32 cases in which the Court of Claims upheld the administrative determination made pursuant to the disputes article or similar provision. This means that over the 15-year period the Court of Claims, in setting aside or upholding such administrative determinations, has had to review less than 50 cases, or an average of about 3 a year. I therefore feel confident that if H.R. 1839 or S. 24 is passed correcting the situation brought about by the Wunderlich decision, there is no reason to fear that a "flood of litigation" will follow.

All of this points up the most important aspect of the corrective legislation—i.e., that the mere existence of an effective judicial review will insure fair and equitable administrative decisions. It is this policing effect which really interests the contractors. With it, they feel that they can enter into negotiations with the contracting officer on a more nearly even footing, and thus be able to arrive at a mutually satisfactory settlement of their problems. In general, as past history shows, the contractors are not interested in the trouble, expense and lost time involved in a court proceeding; their purposes are nearly always served if the contracting officer knows that they have the right to go to court.

6. Fears have been expressed that the reference to the General Accounting Office in S. 24 would give it powers with respect to the review of payments under Government contracts beyond those which it already possesses. In my opinion these fears are groundless in view of the statement in Senate Report No. 32 on S. 24 that the bill "is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction but simply to recognize the jurisdiction which the General Accounting Office already has."

If, however, there is any doubt on the matter it can very easily be removed by striking out the words "the General Accounting Office or" appearing in lines 1 and 2 of page 2 of H. R. 1839 and S. 24.

7. In closing I would like to refer briefly to H. R. 3634 also introduced this session to permit judicial review of administrative decisions under the standard Government disputes clause.

It should be pointed out that this bill would permit judicial review only of disputed questions of fact. Thus if a contracting agency should insert a provision making the contracting officer's decision final on disputed questions of law the courts, under the Moorman and Wunderlich decisions would be unable to review such questions. For that reason I much prefer S. 24 and H. R. 1839 which permit judicial review of all questions whether of fact or of law.

It should also be noted that H. R. 3634 does not permit judicial review of decisions made more than 1 year before the date of its enactment. The effect of this is to exclude from its benefits the contractors who entered into contracts before November 26, 1951, the date of the Wunderlich decision. At the time they entered into the contracts they understood that they had a right to judicial review but thereafter they discovered that the rules were changed. They, of all people, are justly entitled to such a review and should not be excluded from the benefits of corrective legislation.

Mr. RUDDIMAN. I am not here to reargue the Wunderlich case.

Mr. GRAHAM. Nor to lecture the committee?

Mr. RUDDIMAN. No, sir. Neither am I here to take up your time by elaborating on the need for legislation to correct the situation which has been brought about by that case. I simply want to discuss at this time several objections that have been raised to the bill.

At the hearings before the Senate, it was suggested that if we had corrective legislation of this type, it would flood the courts with litigation. So I decided to take a look at the record and see what happened in the 15 years preceding the Wunderlich decision. During that period I was able to discover only 16 cases in which the Court of Claims set aside the decision of a contracting officer under a clause similar to the disputes clause. Those 16 cases are listed on pages 4 and 5 of my written statement.

I think it is interesting to note some of the grounds upon which the Court of Claims relied in setting aside the administrative determinations. In one case they did so on the ground that it was grossly erroneous. In another, on the ground that it had no substantial evidence to support it. In another, on the ground that it was unreasonable and must be set aside as arbitrary. I won't go on and cover all of them but I think I can safely say that in none of those cases where they set aside the decision of the administrative officer did they do so upon a finding that the contracting officer had been dishonest or had any intent to cheat and that is the rule that is required under the Wunderlich decision.

At the same time, I was able to discover during that time, that same 15-year period, 32 cases in which this court reviewed.

Mr. GRAHAM. Have you listed those?

Mr. RUDDIMAN. I have not listed those but I can furnish you with a list of those. I discovered 32 cases in which the Court of Claims had reviewed the determination of the contracting officer but refused to set it aside. That makes a total, I think, of less than 50 cases over a period of 15 years in which the Court of Claims reviewed the determination of a contracting officer. That is about three a year.

Mr. GRAHAM. I made it four.

Mr. RUDDIMAN. I think all these fears about flooding the courts with litigation are groundless. I think that that points up the real importance of this bill and that is that the very fact that a contracting officer knows that his decision can be subjected to an effective review is going to make him render a more just and equitable decision. It is that factor that the contractors are interested in. They do not like to——

Mr. GRAHAM. Will give more consideration before handing down an opinion?

Mr. RUDDIMAN. That is what I feel. The contractors are not interested in going to court. That is a time-consuming process. They have to take their men away from work that they would rather be performing. What they want to be able to do is to go into negotiations with the contracting officer on something that approaches an equal footing. And I feel that the S. 24 or the companion bill, H. R. 1839, would accomplish this very desirable result.

Now, there has been another objection raised or at least there has been a suggestion; there is really no need for corrective legislation because the departments can or will handle this administratively by changing the contract form. We think this is a step in the right

direction. I understand that the General Services Administration has under consideration a changed disputes clause that would give some broader scope of judicial review.

Mr. GRAHAM. At that point, in your judgment, would it be enough or do you think that it is necessary to enact this bill to get what you want?

Mr. RUDDIMAN. I do not think that is enough. I think that is just one step in the right direction.

Mr. GRAHAM. But does not go far enough.

Mr. RUDDIMAN. I would like to point out why I think it is inadequate.

In the first place, there is nothing in the world to prevent, even if they adopt such a clause, there is nothing to prevent the contracting agencies from later reverting to the old standard disputes clause and you would be right back where you started.

In the second place, while I understand that General Services Administration is working on a standard form, I have considerable doubt whether they have authority to prescribe a form that all the Government contracting agencies will be compelled to use.

Another thing, I understand that in that General Services revised clause, the disputed questions or the review would be limited to disputed questions of fact. Under the Moorman decision decided by the Supreme Court, there would be nothing in the world to prevent a specification writer from sticking in the specifications which are made a part of the formal contract a provision making the contracting officer's decision final on questions of law such as interpretation of the contract.

If that were done, the clause suggested by the General Services Administration would not help a bit. On questions of law you would still be faced with the Wunderlich decision. You would have to prove the fraudulent intent.

Mr. GRAHAM. May I interrupt for a moment? Then it is your considered judgment that there must be legislation enacted to overcome that decision?

Mr. RUDDIMAN. It certainly is, sir.

Mr. GRAHAM. Pardon me for interrupting you.

Mr. RUDDIMAN. Another matter that was suggested at the hearings before the Senate was that in some departments, at least, there were appellate boards to review the decision made by their contracting officers and the inference was, I suppose, that if you had that, you did not need too much review from the courts themselves.

I think the answer to that is obvious. Can you image the Government trying an appeal before a board or before a jury which was composed entirely of employees of the contractor?

Mr. GRAHAM. It comes back to the old theory of judge, jury, and executioner all in one place.

Mr. RUDDIMAN. Moreover, this practice of having appellate boards where you can produce witnesses and get a hearing is by no means universal in the Government departments. I can point out, for example, that there is no such board in connection with the Bureau of Reclamation contracts. They handle hundreds of millions of dollars worth of work.

Another criticism of that, or another answer is that you do not always get any testimony from the other side at these hearings. I

know the practice before some of these boards is that the plaintiff or the contractor goes in. He has his witnesses in there and he tells his story. He gets cross-examined and then the Government agency produces no witnesses whatsoever.

Mr. GRAHAM. You never hear from the bureaucrats until you get your final decision.

Mr. RUDDIMAN. Then you will get a recommendation or a decision later on before some of these boards, at least, in which they will refer to some ex parte statement made by the person from whom you have appealed. You never have a chance to cross-examine him. I am not saying it is true of all agencies but it is true of some.

Lastly, I would like to deal with an objection which has been raised to including the General Accounting Office in the provisions of this bill. I don't know just exactly what the basis of the objection is, but in my opinion, any fears along that line are groundless. As I see it, the General Accounting Office, as a matter of practice, in reviewing contracts and change orders for purposes of payment, is always going to apply the standards of review that are granted to the courts. That has been their practice before the Wunderlich decision. They figured if there was good reason to doubt the finality of the decision, the matter ought to be referred to the courts. I think that is all that would be done by the language of this bill.

At one time I thought there would probably be no objection to striking out the reference to the General Accounting Office as mentioned in S. 24 or H. R. 1839. I felt that even if you had no reference, the General Accounting Office would still exercise that same jurisdiction. However, in view of the fact that the Senate has already passed a bill which has included a reference to the General Accounting Office, I think it would be dangerous now to eliminate the General Accounting Office from the provisions of this bill. It might be misconstrued as taking away this jurisdiction from the General Accounting Office.

Mr. GRAHAM. Of course, as you will know, it is needless to refer to it, that the General Accounting Office is the instrumentality of the Congress, and we take special interest in that and feel that at all times it is acting in behalf of both Houses of Congress.

Mr. RUDDIMAN. I quite appreciate that, sir, and I feel if you struck out a reference to it at this point you might endanger any power of review by the General Accounting Office.

That is all I have now, sir.

Mr. GRAHAM. Any questions?

Thank you, sir.

(The following communication was later submitted by Mr. Ruddiman:)

KING & KING,
Washington, D. C., July 31, 1953.

Hon. LOUIS E. GRAHAM,
Chairman of Subcommittee No. 1,
Committee on the Judiciary, House of Representatives,
Washington, D. C.

SIR: At the hearings held yesterday on H. R. 1839, H. R. 3634 and S. 24, I stated that for the 15-year period prior to the Wunderlich decision I had been able to find 32 cases in which the Court of Claims upheld a determination of an administrative officer authorized to make a final decision pursuant to the standard disputes clause or similar provision. At the committee's request, I am enclosing herewith a list of these 32 cases.

In my written statement at page 6 I quoted the language from Senate Report 32 on S. 24 to the effect that the bill was not intended to change the jurisdic-

tion of the General Accounting Office, but simply to recognize the jurisdiction which it already has, and I then stated that if there was any doubt on the matter, it could be removed by striking out the reference to the General Accounting Office. On further reflection, as I pointed out in my oral statement yesterday, I believe that it would be unwise for the House of Representatives to strike out the reference to the General Accounting Office. In other words, I feel that if the bill, as passed by the Senate, had contained no reference to the General Accounting Office, and the House of Representatives had passed such a bill without amendment, the General Accounting Office as a practical matter would, in reviewing payments under Government contracts and change orders, employ these same standards of review that are granted by the bill to the courts. Thus, if the General Accounting Office was confronted with an administrative decision which it thought would be set aside by the courts, it would refuse to make payment and throw the matter into court. However, since the Senate, in passing S. 24, has expressly included the General Accounting Office in the bill, some doubt as to the General Accounting Office jurisdiction might arise if the House of Representatives should then strike out all reference to the General Accounting Office. There would then be the possibility that this action would be construed as limiting review by the General Accounting Office to the ineffective ground of fraudulent intent prescribed by the Wunderlich decision. It is therefore my suggestion that the bill be passed without change in the language employed by the Senate.

Very truly yours,

HARRY D. RUDDIMAN.

CASES IN WHICH THE COURT OF CLAIMS, DURING THE FIFTEEN-YEAR PERIOD PRIOR TO THE WUNDERLICH DECISION, UPHELD THE DETERMINATION OF AN ADMINISTRATIVE OFFICER AUTHORIZED TO MAKE A FINAL DECISION PURSUANT TO THE STANDARD DISPUTES CLAUSE OR SIMILAR PROVISION

Schmoll, Assignee, v. *The United States* (91 C. Cls. 1).
Valley Construction Company v. *The United States* (92 C. Cls. 172).
Western Construction Company v. *The United States* (94 C. Cls. 175).
General Contracting Corp. v. *The United States* (96 C. Cls. 255).
B–W Construction Company v. *The United States* (97 C. Cls. 92).
Caribbean Engineering Company v. *The United States* (97 C. Cls. 195).
Consolidated Engineering Company v. *The United States* (97 C. Cls. 358).
Fleisher Engineering & Construction Company v. *The United States* (98 C. Cls. 139).
John M. Whelan & Sons, Inc. v. *The United States* (98 C. Cls. 601).
Rego Building Corp. v. *The United States* (99 C. Cls. 445).
Merritt-Chapman & Whitney Corp. v. *The United States* (99 C. Cls. 490).
Hunter Steel Company, Inc. v. *The United States* (99 C. Cls. 692).
R. C. Huffman Construction Company v. *The United States* (100 C. Cls. 80).
Frazier-Davis Construction Company v. *The United States* (100 C. Cls. 120).
Fred M. Comb Company v. *The United States* (100 C. Cls. 240).
King v. *The United States* (100 C. Cls. 475).
L. E. Myers Company, Inc. v. *The United States* (101 C. Cls. 41).
Silberblatt & Lasker, Inc. v. *The United States* (101 C. Cls. 54).
A. Guthrie & Company, Inc., et al. v. *The United States* (102 C. Cls. 472).
Crystal Soap & Chemical Company, Inc. v. *The United States* (103 C. Cls. 166).
McCloskey & Company v. *The United States* (103 C. Cls. 254).
Fireman's Fund Indemnity Company v. *The United States* (104 C. Cls. 648).
Crowley v. *The United States* (105 C. Cls. 97).
American Transformer Company v. *The United States* (105 C. Cls. 204).
E. J. Albrecht Company, Inc. v. *The United States* (105 C. Cls. 353).
S. J. Groves & Sons Company v. *The United States* (106 C. Cls. 93).
Guion, Trustee v. *The United States* (108 C. Cls. 186).
Ashville Contracting Company v. *The United States* (110 C. Cls. 459).
Mitchell Canneries, Inc. v. *The United States* (111 C. Cls. 228).
J. A. Jones Construction Company, Inc. v. *The United States* (114 C. Cls. 270).
Holland Page et al. v. *The United States* (120 C. Cls. 27).
DuBois Construction Corp. v. *The United States* (120 C. Cls. 139).

Mr. GRAHAM. We still have about 20 minutes. Does anybody care to be heard?

STATEMENT OF ALAN JOHNSTONE, WASHINGTON, D. C.

Mr. JOHNSTONE. Mr. Chairman I came over by plane this morning. I should like to be heard if you will permit me 5 or 10 minutes.

Mr. GRAHAM. Give your name and address, please.

Mr. JOHNSTONE. My name is Alan Johnstone; I am an attorney at 740 15th Street, Washington. I was for a number of years in the law office of the Government and I was General Counsel of the Federal Works Agency which preceded the General Services Administration.

During that period, Mr. Chairman and ladies and gentlemen of the committee, I had an opportunity to observe from their side of the table the conduct of contracting officers of the Government. Latterly, I have been at the bar and have represented some construction contractors and on their behalf this morning I speak.

I should like to say that I do not know any finer group of officials than the officials of the executive branch of the Government. It is very rarely that one finds an unfaithful public servant. You do not frequently see men in the Government or out of it, I should say, who in the language of the Supreme Court have a desire to cheat or to defraud someone. And the court has held in this disputed decision that the only relief that can be gotten from a decision of a contracting officer is when fraud is alleged and proved and by fraud the court says we mean a desire to cheat or to be dishonest.

I would want to say also that so far as the Wunderlich decision is concerned, Judge Graham, I personally as a lawyer find very little to criticize in it. It is said that fraud is never presumed. It says that the parties hereto contract that each will be bound by the decision of the contracting officer and so its decision enforces that contract.

It does say that heretofore we have in previous decisions equated gross negligence or caprice or gross error to fraud and by their decision in November of 1951 they overruled those previous decisions and said that by fraud now we mean an evident desire to cheat or do wrong and they say, if our decision or definition of fraud is in error, or if it does not do essential justice to the parties, it is the function of the Congress to correct the situation and that, I think, brings this question directly to that part of the Government which has to do with the establishment of its policy which is the Congress and while, Mr. Chairman, I speak on behalf of construction contractors who have in the past and who are now bound in considerable sums to the Government, it is not for that alone that I have a conviction about this bill.

Some reference has been made to the General Accounting Office. I believe that the General Accounting Act represents one of the great advances in the administration of the Government.

Mr. GRAHAM. I think you are quite right.

Mr. JOHNSTONE. I would hate to see its functions avoided by contract, or whittled down by judicial decision; so I rejoice that the Senate committee in its wisdom saw fit to refer specifically to that great Office in this bill.

Certain of those who are said to object to the bill feel that this bill gives to the General Accounting Office additional functions, an additional power. I respectfully suggest that they are mistaken.

Mr. GRAHAM. I appreciate your putting it in that language rather than imputing bad faith to someone.

Mr. JOHNSTONE. I might say my friend, Mr. Leonard, whom I have known for a number of years and in whose integrity and justice I have the highest confidence, that if he should have made that impression upon you——

Mr. GRAHAM. He did.

Mr. JOHNSTONE. It is unfortunate.

Mr. GRAHAM. That is the impression, and I resent it very much. We hear the people who come here, every one, and we impute good faith to all. There may be honest differences of opinion, but to impute bad faith to one group simply because they are in opposition, as long as I am acting as chairman in this committee we will not stand for it.

Mr. JOHNSTONE. I will appeal to your well-known good judgment and judicial attitude to freely accept Mr. Leonard's apology which he made to you and let not that incident becloud your judgment.

Mr. GRAHAM. It will not becloud mine.

Mr. JOHNSTONE. I would say also that the thing that gives me conviction about this bill is that it substitutes for executive justice judicial justice, according to the forms of law, with all the safeguards that we have thrown around it. It substitutes objective judgment for a subjective judgment.

As we all know, we have three departments in our Government and we go to the courts to decide disputes and this bill would throw wide the portals of the courts of justice to anyone, including the Government, which has a grievance and it is no idle thought, sir, to say that the present disputes clause as construed by the court is a disadvantage to the Government because in your own State of Pennsylvania, in the early part of 1952, the attorney general in the district court there sought to recover a sum of $10,000—it may have been $10 million—from a contractor whom the Comptroller said had been overpaid and the judge, I think rightly, citing the Wunderlich decision, said that the man had the money on the judgment of the contracting officer and he could not take it away from him. So that what is sauce for the goose is sauce for the gander.

Therefore, I say, sir, that here is a case for the good judgment of the Congress. This principle of finality of decision is not new. It goes back in our common law, way back, where it originated in the laws of master and servant where a man bound himself to serve his master to the satisfaction of the master; and so he was bound when the master said he was not satisfied though the terms of his service were not ended when he was dismissed; and the old law of indenture—the master had the right to terminate the indenture though the servant did not.

And in the construction of our railroads where expert judgment was required, it was usually put in the contract that the judgment of the railroad's engineer should be final.

And so in the construction of buildings, let the judgment of the architect who is the agent of the owner be final. So that this did not arise in Government contracts but it was adopted by the Government in the early days of Indian warfare where people supplied the Army with supplies in the West, or the Secretary of War could not be present to see whether the flour had weevils in it or whether the meat was moldy, and the contractor wanted pay and you could not be there, the man you give these things to must know and you must contract with

me that his judgment must be final. That may have been all right in the days when the contracting officer was on the ground and could see the facts but today the contracting officer sits in Washington and signs a contract to build an airport in north Africa and he has no more knowledge of the facts than you or I. He gets his report from his inspectors which may or may not be wrong.

Therefore, I suggest to you that this provision is now outworn and that it ought to be so that these decisions could be reviewed. When they are not supported by substantial evidence, and that is the wording of the act. And for the life of me, Mr. Chairman, I cannot see how anyone should object to having anybody's decision reviewed when that decision is not supported by substantial evidence because we do not live in this country under dictatorial government.

Thank you very much.

Mr. GRAHAM. Are there any questions?

Thank you very much.

(The following letter received from Mr. Johnstone prior to the hearing:)

WASHINGTON, D. C., *July 27, 1953.*

Hon. CHAUNCEY W. REED,
Chairman, Committee on the Judiciary,
House of Representatives, House Office Building, Washington, D. C.

MY DEAR MR. REED: Please record me as favoring the early passage of S. 24, as it passed the Senate on June 8, 1953, and H. R. 1839, introduced by yourself in identical language, both permitting judicial review of disputes on Government contracts, and so to substitute the judicial process with all its safeguards for the finality of administrative decision in the determination of the contract rights, both of the Government and contractors with it.

I have appeared and do now speak on behalf of several firms who have in the immediate past been bound and are now bound on considerable undertakings for the Government. Moreover, I speak in the interest of the integrity of the General Accounting Act. Above all, I am interested in justice under the law as administered by impartial tribunals as against Executive orders issued by executive officials who are themselves interested in the outcome of disputes they seek to resolve.

Whatever the finality clause, currently in use in Government contracts, may have in the past had to commend it, in modern practice and especially after the decision of the Supreme Court in the case of Martin Wunderlich decided in November 1951, the continuation of this now antiquated clause means injustice to the Government and contractors as well; adds to the cost of Government contracts because it adds unnecessarily to the risk; and presents a hazard to the contractor, which only free access to the courts of justice can overcome.

The bill, S. 24, as passed by the Senate on June 8, and the bill, H. R. 1839, will result in justice to all concerned and because of the freedom of access to the courts will lessen the volume of disputes in Government contracts because they will make for more careful administrative decisions and lessen the number of arbitrary decisions.

These bills, S. 24 and H. R. 1839, protect the General Accounting Act and the function of the Comptroller General from executive avoidance and judicial whittling, without adding to the present scope and powers of this time-honored congressional safeguard of the constitutional function to raise and appropirate public revenues. As I know of no present necessity to increase the well-considered powers of the General Acounting Office, I would not consciously lend support to any proposal to lessen or weaken or to avoid this essential office which objectively watches over the enormous expenditures of the Government, especially in its defenses, now so greatly extended to meet the uncertainties of a troubled world.

For a more particular analysis and statement of my views on this proposal, I make reference to two statements of mine printed in the hearings before the Judiciary Committee of the Senate in February and March of 1952, and to the statements of others there printed and in the interest of this legislation.

Because of the pressure of time on the committee, I content myself with this statement in lieu of a personal appearance, in response to the invitation in your letter of July 22, 1953.

Respectfully,

ALAN JOHNSTONE.

Mr. GRAHAM. May I make this statement so there will be no misunderstanding? I have fully explained to you the pressure under which we are working today. If there should be a continuation of the Congress next week, truthfully and if the opportunity presents itself, we will continue these hearings at that time. Should we close on Saturday, I think it is utterly impossible to get it done. I fully realize the great need of enacting legislation and the difficulties under which the members of the contracting firms are operating at the moment in view of this decision. But the President has indicated what he wants in the nature of, we will call it, must legislation. He has an agenda. Unfortunately for me, I am handling three of those things: Immigration, submerged lands, and I also serve on the Committee on Governmental Operations, certain reorganizations of Government.

At the moment, I see no opening, no opportunity to finish this, but I do assure you that it will be given full consideration at the earliest opportunity and before we break up and close, may we have the names of all those who wish to be called as witnesses at a future date and we will see that they are called and given opportunity just like Mr. Springer, that he would be called.

Mr. HINES Mr. Chairman, I represent Douglas Aircraft. I simply want to say that especially in view of what has been said here this morning, I would like to reiterate the understanding that there will be an opportunity to be heard against the bill at a later time.

Mr. GRAHAM. I assure you that will be done.

Mr. MCDANIEL. Glen McDaniel. I would like to add my name to those who would object. I am president of the Radio-Electronics-Television Manufacturers Association.

Mr. GRAHAM. Any others?

Mr. MARSHALL. The Associated General Contractors of America wish to be heard not in opposition but in favor of the bill.

Mr. JOHN HAYES. He is speaking for me and for President C. P. Street of the association.

Mr. RUDDIMAN. John W. Gaskins would like to be heard, I know, if the committee has hearings after September first. He will be out of the country until that time, so I know that he would want to appear if hearings are held after that time.

Mr. GRAHAM. Mr. Ruddiman, you have touched on something that none of us knows and that is if we will be called back again. It is the general impression that we may be called back sometime in September or October. I think the thing that will influence it would be Senator Taft's condition and the situation we are in. So we will go right on at this session.

Mr. JONES. I would respectfully ask that my name be kept on the list.

Mr. MARKLEY. Washington Office of the Ford Motor Co. I understand that the Automobile Manufacturers Association has been invited to testify. They were notified that the hearings had been called off.

I know that they want to be heard and I would like to be sure that their name is kept on the list.

Mr. GRAHAM. Your name will be kept on the list, Mr. Markley, and thank you.

This whole proceeding has been so unexpected and so precipitated that none of us knew what the developments might be.

If there is nothing more, we will move over and join the House.

Thank you all very much.

(Whereupon, at 10:45 a. m., the hearing was adjourned.)

(The following statements and letters were submitted for the record:)

STATEMENT OF CALIFORNIA MANUFACTURERS ASSOCIATION, R. K. CUTTER, PRESIDENT

The California Manufacturers Association, a statewide association of California manufacturers and processors, many of whom are defense contractors and subcontractors, recently conducted a survey of its Defense Production Committee, consisting of 100 member companies, concerning S. 24, and the results showed almost unanimous opposition to this bill.

The alleged purpose of the bill originally was to counteract the effect of the Wunderlich case which reversed the Court of Claims and in effect held that the disputes clause precluded judicial review. S. 24, however, is cloudy as to intent and recognizes the jurisdiction of the General Accounting Office which has not previously been concerned with the disputes clause and which would only add confusion to an already complicated matter.

Further, it is alleged that the situation resulting from the Wunderlich case has been resolved by an amendment to the disputes clause in the armed services procurement regulation incorporated into the regulation in the fall of 1952. It is believed that S. 24, if enacted, may nullify this disputes clause.

The association certainly agrees with sec. 2 of S. 24 which states "No Government contract shall contain a provision making final on a question of law the decision of an administrative official, representative, or board" but just as strongly feels that the balance of the bill is unnecessarily involved, is not clear as to intent and should not be acted upon at this time but should be the subject of careful study so the final law shall be so concise that there will be no doubt as to the contractor's right of appeal to the Court of Claims.

STATEMENT OF PAUL M. GEARY, EXECUTIVE VICE PRESIDENT OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION

Mr. Chairman and members of the committee, my name is Paul M. Geary. I am executive vice president of the National Electrical Contractors Association which for the past 52 years has served as spokesman for the electrical contracting industry. Among the association's 3,200 members are included practically all of the independent specialty electrical contracting firms that perform contracts for electrical construction for the Federal Government. While the bulk of electrical construction to the Federal account is by subcontract, there is a considerable volume of important work that is undertaken by electrical contractors as prime contractors with the Government. This is especially true on electrical transmission and distribution projects of the Bureau of Reclamation and the various public power agencies.

So the electrical contractor is not without direct knowledge and experience with the subject the proposed legislation (H. R. 1839, H. R. 3634, and S. 24) before this committee is addressed to—the matter of finality clauses in Federal Government construction contracts.

Even in the instances of subcontracts, the electrical subcontractor finds himself seriously involved because disputes over the interpretation of a specification or clause in a contract concerns the subcontracted specialty work. Although the electrical subcontractor does not deal directly with the Federal agency at interest, he becomes the principal in transactions and communications through the prime contractor.

It has been the experience of electrical contractors that most disputes over provisions of Federal construction contracts originate from loosely drawn, inaccurate specifications and plans. There has been a marked tendency in recent years for the Federal construction procuring agencies to bypass or usurp the functions of the qualified professional architect and engineer and attempt to develop and present to the industry plans and specifications that, due to the inexperience of the drafters, are not definitive and are sometimes even misleading. The industry thus is called upon to establish a price on an ill-defined basis. The result is bids all over the lot because the bidders interpret the proposal variously. Usually the too-eager, less-cautious bidder gets the job at a figure he finds to be below actual cost of production when the contracting officer interprets the plans and specifications.

Armed with the dictatorial authority vested in him by the Supreme Court decision in the Wunderlich case, the contracting officer can become very arbitrary and, through caprice and whim, can inflict most serious penalties upon the contractor.

The fact that decisions of such contracting officers are not final but are subject to a review by the courts, brings to bear in such cases a more careful approach on the part of these public servants. It can be the difference between a reasonable man and an autocrat.

The bulk of cases involving disputes over provisions in Federal construction contracts come from the smaller contractors. Many of them do not have the time and the long years of experience in dealing with Federal agencies to avoid these pitfalls in doing business with their Government. Let me give you an example. I have here the specifications for a project that recently was awarded in West Virginia for installation of fluorescent lighting fixtures in a post office. There are 45 pages, many in fine type, the contractor must read. And he must read every line, for hidden in the various cross references are things that can make or break him. In addition to the specifications there are three blueprints that are a part of the plans he must review. On this project the Government stipulated on the blueprints a notation that "all four-tube fixtures on the first and second floors are to be furnished by the Government and installed by the contractor." It is so stated on the blueprint. There were nine bidders—from West Virginia, Maryland, New York, Virginia, and Washington, D. C., and every one of them submitted a bid that did not allow for the contractor to buy these fixtures, the actual out-of-pocket cost to the contractor for them being in excess of $3,500. But in the fine print of the 7 pages of general conditions there is a reference that could be interpreted as requiring the contractor to furnish this material. The agency involved frankly admitted an error in preparing the drawings yet the contractor is being obliged to purchase this material out of his own pocket and proceed with the job. Certainly, justice in this case demands at least the right to court review.

In California at an Air Force project a contracting officer has required an electrical contractor to place a long run of conduit in concrete although the plans and specifications do not call for that and sound engineering practice and custom in the industry does not require this costly and wasteful procedure in this instance. Here, again, the public interest can be served by subjecting such a capricious and arbitrary decision to court review.

The vast majority of construction contracting officers of the Federal Government are careful, competent, and conscientious men. They have a tremendous responsibility. It is not reasonable to assume that all of them can be thoroughly qualified to handle all of the thousands of details in a construction proposal with pencil-point accuracy and definitiveness. Theirs is a field of activity that calls for congressional guidance in the public interest. Already this committee has wisely acted to recommend the enactment of legislation that will help guide these public servants in doing a better job. I refer to the House Report No. 982 on the Federal Construction Contract Act (H. R. 1825). We trust that the Congress will enact that meritorious legislation promptly. The committee now has the opportunity to render further assistance in achieving a sounder Federal construction policy by reporting favorably this legislation involving finality clauses (H. R. 1839 and S. 24). The National Electrical Contractors Association endorses this legislation in the form of H. R. 1839 and S. 24 and urges the committee to report favorably on it.

STATEMENT OF DAVID REICH

I am appearing here on behalf of the American Bar Association.

At the 75th annual convention of the association, held September 1952 at San Francisco, the following resolution was adopted:

"That it is the opinion of the American Bar Association that the determination of contracting officers and reviewing officials under the finality clause of Government contracts should be subject to judicial review, in accordance with the criteria of the Administrative Procedure Act, and that the section of administrative law be authorized and directed to advance appropriate legislation to that end."

We have studied the legislation pending before your subcommittee and we find that both S. 24 and H. R. 1839 are in substantial accord with the wishes of the association in this matter. We, therefore, recommend their enactment.

The decision of the Supreme Court in *United States* v. *Wunderlich* (342 U. S. 98, 96 L. ed. 113 (1951)), coming as it did on the heels of *United States* v. *Moorman* (338 U. S. 457, 94 L. ed. 256 (1950)), caused deep concern in business and legal circles. The effect of these decisions is to place contracting officers of the Government in a unique position among agency officials. They are now clothed with almost absolute power over contract disputes cases which frequently involve millions of dollars. They can decide with finality questions of fact as well as questions of law and the only appeal that may be taken from their ruling is to the agency itself. The contractor with the Government, in such a case, can seek relief in the courts only if he can alleged and prove "conscious wrongdoing" on the part of the contracting officer, which Mr. Justice Minton, on behalf of the majority of the court in the Wunderlich case, equated to "an intention to cheat or be dishonest."

This is an impossible standard, as the majority of the Court itself in Wunderlich must have recognized, when it stated, "If the standard of fraud that we adhere to is too limited, that is a matter for Congress" (96 L. ed., at 116). The Congress itself was quick to take action. In the last session, the Senate passed S. 2487, which is identical in all respects with S. 24, which passed the Senate during this session. H. R. 1839 is the companion bill to S. 24, and as I have said above, these are the bills the enactment of which the American Bar Association is recommending.

There is no valid reason for placing a contracting officer on a pedestal of absolute authority subject only to the review of an appeal board within his own agency. A contracting officer does not necessarily have the expertness which is normally associated with persons who are authorized to make agency determinations. Frequently, a contracting officer is a member of the armed services, who is assigned as a contracting officer for only a limited period. It may be but one of his tours of military duty. As contracting officer he may be on the staff of a general whose very command is concerned with the dispute to which this contracting officer is assigned. It is not unnatural for such a person to think the same way as his command, and to give more credence to evidence produced by his fellow officers than to that presented by persons in private life. Such a contracting officer may not intend to do any wrong; unwittingly, he is just not impartial. Under the present ruling of the Supreme Court, his decision, however, would not be subject to court attack despite the fact that it may be patently arbitrary, capricious, or rendered without due regard to the rights of the parties.

H. R. 1839 can remedy this situation, since it will allow review by the courts of any contract disputes decision which a court "finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence." An additional feature of this bill—and which makes it preferable to H. R. 3634—is that it prohibits any Government contract from containing any provision making the decision of an administrative agency final on questions of law. The effect of H. R. 1839, therefore, is to change legislatively the Wunderlich and Moorman decisions.

We trust that action will be taken on this pending legislation before the end of the present session. Such legislation is needed immediately. If no action can be taken now, we would appreciate the opportunity to appear before you again, if necessary.

FERGUSON & BURDELL,
Seattle, Wash., July 28, 1953.

Re S. 24, H. R. 1839, and H. P. 3634

DEAR SIR: This is to thank you for your invitation to appear before Subcommittee No. 1 and testify with respect to the foregoing bills and to advise you that

I will be unable to appear in person but would appreciate the opportunity of submitting the following written statement for the record.

My law firm has represented contractors, subcontractors, and construction industry associations for many years. We have followed the course of legislation which has been proposed to relieve the construction industry and the Government of the burdens placed upon them by the Supreme Court in *U. S.* v. *Wunderlich* and strongly favor such legislation.

I am sure that your committee has already been advised of the change in the law made by the Wunderlich decision and its unfortunate effect in increasing costs to the Government as well as those instances of abuse of power by contracting officers. In addition to these factors I favor the proposed legislation for the following reasons:

Recent congressional policy has emphasized that it is abhorrent in our system of government to permit the Government to deal with its citizens unfairly and without adequate access to the courts. The Administrative Procedure Act, act of June 11, 1946 (c. 324, 5 U. S. C. sec. 1001, *et seq.*), determined that the courts should be able to review administrative decisions. Section 1009 (e) establishes that the courts may overturn administrative decisions where they are "arbitrary, capricious, an abuse of discretion" or "unsupported by substantial evidence." All of the criteria of justice and fair dealing that resulted in passage of the Administrative Procedure Act apply with equal or greater force to the legislation now under consideration.

No modification of policy by the executive branch of the Government will answer the problem. It is primarily the existence of the power, not its exercise, that injures the Government. Even if a policy should be adopted of not taking advantage of the Wunderlich decision that policy is subject to change without notice and indeed is subject to abuse at any time by any single contracting officer.

It appears that the objectives of both H. R. 1839 and H. R. 3634 are the same. H. R. 1839 seems to accomplish that purpose more effectively, however, since it applies to all existing disputes and also prohibits contract finality provisions regarding questions of law. H. R. 3634, on the other hand, would appear to leave an hiatus in the law by permitting application of the Wunderlich decision to those disputes decided more than a year ago. No reason appears why the contractors affected by such a decision should be fortuitously penalized.

We agree wholeheartedly with the dissenting opinions of Mr. Justice Douglas, Mr. Justice Reed, and Mr. Justice Jackson in the Wunderlich case. We urge favorable consideration and passage of H. R. 1839.

Very truly yours,

CHARLES S. BURDELL.

PHILCO CORP.,
Philadelphia, July 29, 1953.

Re S. 24

Mr. CHAUNCEY W. REED,
Chairman of the Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR MR. REED: This is in reply to your letter of July 22, 1953 concerning the above subject.

Since there are a large number of witnesses and since hearings are scheduled for only 1 day, we have decided in accordance with your suggestion, not to give oral testimony. In lieu thereof we are offering this letter for incorporation in the record of the hearing.

We are not in favor of the bill because we feel that the existing procedure for settling disputes, although susceptible to improvement, is fundamentally a better procedure than that suggested by the present bill. To change the present procedure would only cast doubt upon decisions of the Armed Services Board of Contract Appeal and needlessly consume valuable time.

Glen McDaniel, president of the Radio Television Manufacturers' Association (RTMA), plans to present personally the industry's position to this bill at the hearing on July 30. We wish to go on record in favor of this position.

I appreciate the courtesy which you have extended to permit us to present our views of the subject bill.

Yours truly,

PHILCO CORP.,
J. H. GILLIES,
Vice President—Government and Industrial Division.

NATIONAL FEDERATION OF AMERICAN SHIPPING, INC.,
Washington, D. C., July 9, 1953.

Hon. CHAUNCEY W. REED,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR MR. REED: S. 24 which is pending before your committee provides that no provision of any contract entered into by the United States relating to the finality or conclusiveness of a decision of an administrative official of the United States in a dispute involving a question of fact arising thereunder shall be pleaded as limiting judicial review of any such decision to cases in which fraud by such official is alleged. Any such provision is made void with respect to decisions which the General Accounting Office or a court finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence. Government contracts are prohibited from containing provisions making final on questions of law the decisions of administrative officials.

The purpose of the bill is to overcome the inequitable effect of a Supreme Court decision (*United States* v. *Wunderlich*, Sup. Ct. Oct. term 1951) holding that where Government contracts provide that disputes concerning questions of fact arising thereunder are to be decided by Government representatives, such decisions shall be conclusive on the parties in the absence of a finding of "fraud." The Supreme Court said that "fraud" meant "conscious wrong doing, an intention to cheat or be dishonest." The effect of the holding is to prohibit judicial review of decisions of Government officials in such instances, since it is practically impossible to prove fraud on the part of Government officials.

As the representative of a majority of deepwater American-flag shipping, the Federation wishes to express its support of the purpose of S. 24. However, the Federation urges that the bill be amended so as to delete the provision permitting review by the General Accounting Office of decisions of administrative officials. The effect of the provision is to set up the General Accounting Office as a "court of claims." It is unnecessary to point out that an agency of the legislative branch of the Government should not be used to perform functions intended for the judicial branch.

The statement is made in Senate Report No. 32 which accompanied S. 24 "that it is not intended to narrow or restrict or change in any way the present jurisdiction of the General Accounting Office, either in the course of a settlement or upon audit; that the language in question is not intended either to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has". If such is the purpose of the bill, the provision appears to be entirely unnecessary. The General Accounting Office already has sufficient authority for passing upon the validity of expenditures of public funds, and to settle and adjust claims by or against the United States.

The Federation also urges that the bill be amended so as to make it quite clear that it will not be necessary for a contractor to prove that a decision of an administrative official is both fraudulent and erroneous in order for a court to find that a finality clause is void. This can be accomplished by insertion of the word "or" immediately after the word "fraudulent" in line 11, page 2, of the bill.

The contractor should not in any event be required to prove that a decision is "so mistaken as necessarily to imply bad faith". This is tantamount to requiring proof of "conscious wrongdoing, an intention to cheat or be dishonest" on the part of the administrative official. Obviously, proof of this nature is difficult, if not impossible. The phrase reading "so mistaken as necessarily to imply bad faith" should, therefore, be stricken from the bill.

The Federation respectfully urges that S. 24 be amended as it has suggested, and requests that this letter be incorporated in the record of any hearings which may be held by your committee.

Very truly yours,

A. U. KREBS, *Counsel.*

ASSOCIATION OF AMERICAN SHIP OWNERS,
New York, N. Y., July 27, 1953.

Re S. 24, H. R. 1839, H. R. 3634

Hon. CHAUNCEY W. REED,
Chairman, Committee on the Judiciary, House of Representatives,
Washington, D. C.

MY DEAR MR. CHAIRMAN: The purpose of this letter is to express our approval of S. 24 which has already been passed by the Senate. The purpose of the bill is to reinstate the construction of the "finality clause" in Government contracts that generally obtained before the Supreme Court's recent decision in the Wunderlich case. We hope the bill will be favorably reported by your committee and approved by the House. We would appreciate it if you would incorporate this letter expressing our views in the record of the hearings.

This association is composed entirely of American-flag shipowners, all of which operate without subsidy aid under the Merchant Marine Act, 1936. The members include some of the oldest and best-established American shipping companies.

As an example of the interest of our members in the principle underlying the purposes of the above bill, we would like to call the committee's attention to the form of time charter under which the Military Sea Transportation Service employs the services of American vessels. In substance, that charter provides that the shipowner shall furnish the Navy with a specified vessel together with a full crew for a designated period of time and at an agreed rate of charter hire calculated to cover all normal operating costs. The charter party contains the standard form of finality clause providing that whenever there is any dispute concerning a question of fact, the decision of the Secretary of the Navy or his authorized representative shall be "final and conclusive."

Under the charter, the shipowner in general bears all the crew costs. "Whenever it is necessary," however, to employ a crew for services normally performed by longshoremen (services requiring the payment of overtime under applicable collective bargaining agreements between the shipowner and the unions), then the charter provides that the Navy has to bear the so-called overtime costs for such work. Under the Wunderlich decision, an authorized representative of the Navy might arbitrarily declare that longshore work required by the Navy to be done was, in fact, not necessary and to disclaim all liability regardless of the true facts.

Another instance of possible injustice to the shipowner that might result from the finality clause as construed by the Supreme Court may be pertinent. The charter party provides that at the end of the charter period the Navy is obligated to repair all vessel damages caused by its stevedores. Under the doctrine of the Wunderlich case the Navy could arbitrarily claim that such damages were not, in fact, caused by its stevedores and disclaim any liability for repair. In this instance, even assuming the Navy concedes its liability, it may elect under the charter party to pay "a sum to be agreed upon" between it and the shipowner, representing the estimated cost of the repair work plus the charter hire for the time which such work should take. If there is disagreement as to the amount owed by the Navy, such disagreement under the charter party is to be regarded as a "dispute concerning a question of fact" and the amount the Navy sets is considered to be "final and conclusive."

Thus, under the doctrine of the Wunderlich case, the Navy is in effect given a blank check to determine the dollar amount of its admitted liability and to do so without fear of reversal, though it may have acted arbitrarily, perversely, or in bad faith.

We think it is important that the right to judicial review in cases such as those outlined above should be preserved, not only to insure justice for private contractors dealing with the Government but to protect the system of checks and balances on which our Government is based and to limit the possible abuse of administrative discretion that is encouraged by the grant of arbitrary power.

The considerations set forth above apply also, of course, to H. R. 1839 and H. R. 3634. We have chosen to support S. 24 simply because the Senate has already passed it.

Yours sincerely,

GEORGE W. MOROAN, *President.*

SHIPBUILDERS COUNCIL OF AMERICA,
New York, N. Y., June 11, 1953.

Subject: H. R. 1839 and S. 24, judicial review of Government contract disputes.

Hon. CHAUNCEY W. REED,
Chairman, House Committee on the Judiciary,
Washington, D. C.

DEAR MR. CHAIRMAN: At the time the Senate Judiciary Committee of the 82d Congress had under consideration various proposed bills to resolve the situation created by the Supreme Court's decision in the "Wunderlich" and "Moorman" cases, the Shipbuilders Council of America submitted a statement to the Senate committee stating the views of its members and recommending that any measure enacted by the Congress should:

"First, state that no contract entered into by the United States shall hereafter contain any clause which would limit the contractor's right to judicial review of any questions of fact and of law arising out of the contract and that any such provision in existing contracts shall be void.

"Second, state that, as to questions of fact, there may also be included in the contract a provision for a right of appeal by the contractor to some tribunal or board of contract arbitration, which body would be constituted and appointed in such a way as to insure the contractor of an impartial decision on all the evidence as to such question of fact, without limiting the contractor's right to a subsequent judicial review of any such matter."

The members of the council are pleased to note that your bill H. R. 1839 and its Senate counterpart, S. 24, also before your committee, propose a solution substantially along these lines.

It is hoped that your committee will take appropriate action to the end that this most important measure will become law at this session.

There is attached hereto for your information a copy of the statement submitted by the council to the Senate committee last year on this subject.

Respectfully yours,

L. R. SANFORD, *President.*

STATEMENT BY SHIPBUILDERS COUNCIL OF AMERICA

This statement is filed on behalf of the members of the Shipbuilders Council of America, an association comprising representatives from substantially all of the major shipbuilding and ship repairing companies of the United States.

Roughly, as of February 1, 1952, it is estimated that approximately 57 percent of the total number of vessels of over 1,000 tons under construction in the shipyards represented by the council are subject to Government contract forms and procedures.

With respect to ship repairing, it is not possible to arrive at any firm distribution figure as between Government and private commercial repair work. However, the latest figures released by the Maritime Administration show that, as of February 1, 1952, the active American merchant marine consisted of 2,046 vessels, of which 763 were Government-owned. Not included in these figures are a very considerable number of vessels owned by the Military Sea Transport Service, Department of the Navy, which are also in active service and which are put into private American shipyards for repairs under Government contract forms and procedures. Some additional repair and conversion work is also allocated to the private yards by the Navy with respect to its other vessels and from time to time vessels owned by the Coast Guard and other Government agencies provide a limited volume of work. Summing up the above, it can be readily seen that the percentage of the total dollar volume of ship repairs done in the yards of members of the council subject to Government contract procedures and forms is very considerable.

Each ship construction or ship repair contract where a Government vessel is involved, includes a disputes clause in some form.

In view of the above, it is evident that the members of the Shipbuilders Council of America have a substantial interest in the legislation under consideration by the committee. Also, by virtue of their many years of practical experience with operation under Government contracts, they feel that their views should be given consideration by the committee.

As has been indicated, the members of the council have contractual relations with a number of Government agencies. Each of these agencies, in turn, has its own form of contract or contracts designed to fit its own particular need and

reflecting in its draftsmanship, to the extent permissible by law, the particular philosophy of those in power in the agency. Over the years, therefore, it can be appreciated by the committee that the members of the council have participated in a considerable number of contract negotiations with these various agencies to arrive at appropriate clauses but without too much success.

With particular reference to the disputes clause, the members of the council have repeatedly advanced the view that—as a minimum—where there arises a dispute which cannot be resolved by negotiation and mutual agreement, then the contract should provide for the right to appeal to some impartial person or board for final settlement by a process similar to arbitration. In some contracts, the industry has been successful in having such a provision included, in other cases it has not. In any event, the disputes clause has varied from contract to contract and from agency to agency.

The committee may find of interest the following chronological summary of a recent negotiation with the Maritime Administration in which the disputes clause incidentally figured. Neither the council nor any of its members has any desire to reflect upon the Maritime Administration by this reference, as relations with that agency have been reasonably satisfactory, but, under the Wunderlich decision, the legal remedies heretofore available have been substantially curtailed.

On January 6, 1951, the 81st Congress enacted Public Law 911 which authorized and provided funds to the Maritime Administration to undertake the construction of a number of Mariner-type cargo vessels. Although the Maritime Administration had a number of contracts under its supervision at the time, emergency conditions and a number of other factors had indicated that a new form of shipbuilding contract was desirable and actually, as a preparedness move, the Administration had been discussing such a new contract with the industry for some time. During these discussions the Administration proposed a draft of contract which included the following disputes clause.

"Article 32—Disputes: If at any time (including the guaranty periods specified herein) any doubts or disputes arise concerning any question under this contract, or as to anything in the drawings, plans, or specifications, the matter shall be referred at once to the Maritime Administration, and its decision in the premises shall be conclusive and binding upon the parties hereto."

In a letter to the Administration as to this clause, the council stated that:

"It is the opinion of the council and the industry that, in event of disputes of whatever nature, which cannot be resolved by negotiation and mutual agreement, same should be handled by arbitration rather by unilateral Government decision. It is recommended that such a provision be made."

The Maritime Administration thereupon redrafted the article and resubmitted it to the industry for further comment, in the following form:

"Article 32—Disputes: If at any time (including the guaranty periods specified herein) any doubts or disputes arise concerning any question under this contract, or as to anything in the drawings, plans, or specifications, the matter shall be referred at once to the Maritime Administrator, and his decision (or that of a board or committee designated by him to act for him in the premises) shall be conclusive and binding upon the parties hereto."

In reply to this revision the council, writing for the industry, informed the Maritime Administration that:

"This article already has been revised to include the appointment of a board or committee designated by the Administrator to act for him in the premises, but such a revision has no practical advantage without an opportunity for the contractor to appear at a hearing before such board or committee and present his case. Without such a hearing, any decision rendered is still a unilateral decision based upon a report of the Administrator's representative without the benefit of evidence presented by the contractor who, in such cases, stands in the shoes of a defendant who certainly is entitled to his day in court. This article should be rewritten to provide for a hearing, if requested by the contractor, before the Administrator or board or committee designated by him to act for him in the premises."

The final form of contract signed by the various shipyards building the Mariner vessels includes a clause further revised as follows:

"Article 32—Disputes: If at any time (including the guaranty periods specified herein) any doubts or disputes arise concerning any question under this contract, or as to anything in the drawings, plans or specifications, the matter shall be referred at once to the Maritime Administrator, and his decision (or that of a board or committee designated by him to act for him in the premises), after

consideration of the facts presented by both parties, shall be conclusive and binding upon the parties hereto as to matters of fact and of law."

The committee will note that the Administration agreed to allow the contractor to present his case to the board or committee but, at the same time and without previous warning, revised the language to specifically state that the findings of such person or persons would be conclusive not only as to matters of fact but also as to matters of law.

As thus written the Maritime Administration shipbuilding contract disputes clause is even more objectionable than the clause which the Supreme Court considered in the Wunderlich decision yet it was accepted reluctantly by the shipyards because practical considerations make it impossible for them to take a firm position in such matters. The Supreme Court's observation in the Wunderlich decision that contractors are not compelled or coerced into making the contract may be true in some instances and in some industries, but, in view of the volume of work originating with the Government and the need for that work by the shipbuilding and ship repairing industry, it is certainly an unrealistic viewpoint if applied to that industry.

Based on the above history of negotiations with respect to the disputes clause in the present Mariner contracts, and also because of their experience over the years with respect to other contract negotiations pertinent to this clause, the members of the council are convinced that Congress must act in this matter. They feel that the mechanisms and right to review of disputes of questions of fact or law arising under their contracts should not be a subject for continual negotiation each time new contract discussions are undertaken with a Government agency but are matters which should be permanently settled by proper legislation of a positive nature.

The members of the council, however, do not advocate for Government contracts any remedies which they do not already have, as a matter of law, in respect to their private contracts.

The members of the council do not feel that any of the bills so far introduced would provide a satisfactory solution of the present situation. They request that legislation be enacted which would approach the problem in a positive rather than a negative way. In other words, they would restrict the kinds of disputes clauses that may be included in Government contracts and take them out of the matters which would be subject to negotiation between the contractor and the Government.

Specifically the members of the council recommend that any measures enacted by the Congress should:

First, state that no contract entered into by the United States shall hereafter contain any clause which would limit the contractor's right to judicial review of any questions of fact and of law arising out of the contract and that any such provision in existing contracts shall be void.

Second, state that, as to questions of fact, there may also be included in the contract a provision for a right of appeal by the contractor to some tribunal or board of contract arbitration which body would be constituted and appointed in such a way as to insure the contractor of an impartial decision on all the evidence as to such question of fact, without limiting the contractor's right to a subsequent judicial review of any such matter.

REVIEW OF FINALITY CLAUSES IN GOVERNMENT CONTRACTS

THURSDAY, JANUARY 21, 1954

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 1 OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to notice, at 10 a. m., in room 346, Old House Office, Hon. Louis E. Graham (chairman) presiding:

Present: Messrs. Graham, Hyde, Celler, Walter, Frazier, and Miss Thompson.

Also present: Mr. William Foley, committee counsel.

Mr. GRAHAM. A quorum is present, and the committee will come to order.

Our first witness scheduled for today was the chairman of our committee, Mr. Reed. He has been delayed in arriving. Mr. Willis of the committee is present, and we will have him as the first witness.

STATEMENT OF HON. EDWIN E. WILLIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. WILLIS. Mr. Chairman, I am thankful to the subcommittee to listen to me just for a moment on the bill I introduced, H. R. 6946. As author of the bill, however, it is not my intention to press the subcommittee for the approval of my particular bill, because I have no pride of authorship. My idea is to see that legislation is enacted. Of my own knowledge, I know the work that this subcommittee has done in connection with the decision of the Supreme Court in the Wunderlich case.

The provisions of the bill I introduced are, of course, substantially along the lines of the other bills before the subcommittee.

(The bill, H. R. 6946, is as follows:)

[H. R. 6946, 83d Cong., 2d sess.]

A BILL To permit review of decisions of Government contracting officers involving questions of fact arising under Government contracts in cases other than those in which fraud is alleged, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no provision of any contract entered into by the United States, relating to the finality or conclusiveness, in a dispute involving a question arising under such contract, of any decision of an administrative official, representative, or board, shall be pleaded as limiting judicial review of any such decision to cases in which fraud by such official, representative, or board is alleged; and any such provision shall be void with respect to any such decision which a court, having jurisdiction, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence.

SEC. 2. No Government contract shall contain a provision making final on a question of law the decision of an administrative official, representative, or board.

Mr. WILLIS. After the Supreme Court handed down its decision in November of 1951 concerning the finality disputes clause in Government contracts, judicial review of disputes concerning questions of fact was foreclosed unless the aggrieved party alleged and proved fraud with respect to the decision of the contracting officer or the department head. The Court used these words: "By 'fraud' we mean conscious wrong-doing, an intention to cheat or be dishonest."

I am sure that you have heard before and will hear today the serious problems that have resulted from this decision. One has only to consider the number of business firms and the volume of Government contracts involved in order to comprehend the gravity of the problem which has been created by the Wunderlich decision. If the situation is permitted to stand, the traditional American sense of fair play can never operate in this field of Government contracts. I, for one, have always been a firm believer in permitting an aggrieved party to a dispute to have his day in court. I do not mean to impugn the honesty or integrity of any Government employee or official, but I do believe that the utmost fairness in a dispute can be achieved only by permitting recourse to the courts, and it should be kept in mind that this Wunderlich decision could react and has reacted unfavorably to the Government where the Government felt it was the aggrieved party.

I have heard certain objections raised to the enactment of this legislation, but I have not found any substantial merit in these objections. It has been said, for instance, that the enactment of the legislation might result in a flood of litigation. I am not sure that that would be true. I doubt it. But that is certainly a dangerous doctrine to embrace. In other words, it is certainly un-American to say, "In order to relieve the courts of work, we shall deny people a cause of action." Our courts were created to administer justice to all, that is the sole reason for their existence. The volume of cases is of no concern.

Another statement that has been raised against these bills is that there is no need for them because many of the agencies have altered their rules and regulations concerning the finality disputes clause. In this respect, I wish to point out that while it may be so today, we have no guarantee it will be tomorrow.

In conclusion, I wish to urge most strongly that the committee take immediate favorable action to report out a bill which will give a sense of balance and security to both the contractors and the Government. My study and analysis of the problem have led me to the inevitable conclusion that enactment of legislation such as this is and can be the only sound, equitable solution to the problem which has resulted from the Wunderlich decision.

Mr. GRAHAM. When you have finished with any interrogation on the part of the members of the subcommittee, will you join with the members of the committee? Mr. Walter, is there anything you wish to ask him?

Mr. WALTER. Of course, the argument that the enactment of this legislation would bring about much litigation is a very familiar one. That was the argument advanced at the time the Administrative

Procedures Act was enacted into law, and of course that just didn't happen. Do you not feel that the mere existence of this law would bring about more fair decisions, or at least eliminate to some extent the possibility of them being unfair, unjust, and improper decisions?

Mr. WILLIS. I think so. Fundamentally, it would seem to me that the contracting officers themselves would want to be saved the embarrassment of treading on the field of fraud, and they would lean backward. As it stands now, I think it would be a wholesome thing to enact the law.

Mr. GRAHAM. We are very glad this morning to welcome Mr. Hyde to our subcommittee. Do you have any questions?

Mr. HYDE. The only question that occurred to me was that you mentioned there might be a time when the Government was the aggrieved party. With the present procedure, the Government is not likely to be the aggrieved party?

Mr. WILLIS. It could be. It could very well be, because here you are dealing with fraud, and the court says that in order to have relief one must be guilty of fraud. Now, a contracting officer who hands down a decision against the Government can very adversely affect the Government itself, and the Government some of these days might find a decision very much against itself. The decision works both ways, in that there is no appeal either way from the holding of the contracting officer unless a showing of fraud is made, and the Government itself might be caught some of these days under this Wunderlich decision. I know of one case when the court so ruled.

In the area I am particularly concerned about, public works in the field of flood control and levee building, drainage and irrigation, this strikes at supplying the Army, the Navy, and all departments of the Government in this general field of Government contracts. So the Government itself might be hurt some of these days.

Mr. HYDE. I am not as familiar as some of the other members with this, but is the effect of the law now to give the contracting officer the final word on the question of fact?

Mr. WILLIS. Exactly, excepting where you can show that the contracting officer intended to cheat one side. Now, those are rough words. The Supreme Court used the words that unless there is a showing that he was dishonest to the extent of wanting to cheat, you cannot overrule the contracting officer on matters of fact.

Mr. HYDE. If the contracting officer makes a finding, under what circumstances would the Government be the one to take an appeal or want to take an appeal? Who would be the one in the Government to say, "We are going to take an appeal"?

Mr. WILLIS. I imagine the General Accounting Office would be interested, and the Department of Justice and the Department of Defense. Suppose a dispute arises in the interpretation of the meaning of the plans and specifications or what constitutes extras in the contract and what constitutes default and what constitutes reasonable performance, and the various elements that we lawyers know are presented in matters of public contracts and an issue is drawn between the contractor and the Government. And then on matters of fact the contracting officer holds one way. Then neither side has recourse unless there is a showing that the contracting officer was dishonest,

was guilty of fraud, or intended to cheat someone. Those are the words of the Supreme Court.

Mr. HYDE. Thank you.

Mr. GRAHAM. Mr. Reed, you are the next witness.

STATEMENT OF HON. CHAUNCEY W. REED, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. REED. Mr. Chairman, and members of the subcommittee, my purpose in appearing before you this morning is to urge upon you prompt and favorable consideration of the legislation which would permit judicial review of the decisions of contracting officers. I fully realize your knowledge and familiarity both with the bills now pending before you, including H. R. 1839, of which I am the author, as well as the seriousness of this problem. You know full well the impact and ramifications that have resulted from the decisions of the Supreme Court in the Moorman and Wundelich cases.

Many witnesses who will appear before you today will, I am sure, cover not only those decisions but also the problems that have arisen because of them. I am interested in seeing prompt and favorable action on a bill which will solve this problem to the satisfaction and best interests not only of the Government but also of the private contractors.

Since the last hearing by this subcommittee on these bills, I have received a letter from the Comptroller General of the United States, dated December 30, 1953. In this letter he suggests an amendment in the nature of a substitute for the language now contained in the bill S. 24 and in my bill, H. R. 1839. In that regard, I would like to quote from that letter:

> Since the end of the past session of Congress this Office has given the matter further consideration and the subject has been discussed with various administrative officials and representatives of industry. As a result a substitute draft of a bill has been developed as follows:
>
> AN ACT To permit review of decisions of the heads of departments, or their representatives or boards, involving questions arising under Government contracts
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> SEC. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.
>
> We have reason to believe that should the Congress decide to enact legislation on this subject there would be no opposition to this substitute language by various representatives of industry groups, including The Associated General Contractors of America, Inc., the Aircraft Industries Association of America, Inc., and the Radio-Electronics-Television Manufacturers Association. And representatives of interested administrative agencies have indicated to us that while they believe no legislation is necessary there would be little or no opposition to the particular language of this substitute draft. In my judgment this substitute language will accomplish what we have been striving for all along and will place the General Accounting Office in precisely the same situation it was in before the decisions in the Wunderlich and Moorman cases.

For the reasons indicated above, and in the belief that there might be little difficulty in obtaining the enactment thereof, I strongly recommend that the draft bill quoted herein be substituted for S. 24 and H. R. 1839 and that action thereon be taken at an early date. Representatives of this Office will be available to discuss the matter with you or members of your staff at any time should you so desire.

Sincerely yours,

LINDSAY WARREN.

In conclusion, gentlemen, let me say that your witnesses will undoubtedly have further comment upon the proposed amendment of the Comptroller General. I wish to repeat that I cannot urge too strongly my desire that a bill be enacted as quickly as possible.

Mr. GRAHAM. Thank you. Any questions?

Mr. WALTER. Just one question, Mr. Chairman. In your opinion what effect would the enactment of any of these bills have on existing contracts, including those that are already in the courts?

Mr. REED. I do not know if there would be any.

Mr. WALTER. In other words, you feel that the enactment of this legislation would apply only to contracts entered into after the adoption of the law. Do you not feel that perhaps we ought to consider during the course of the hearings the advisability of making the legislation we enact applicable to existing contracts?

Mr. REED. I would think so.

Mr. GRAHAM. Mr. Willis, any questions?

Mr. WILLIS. I am very much interested in the point developed by Mr. Walter. I think we are dealing here with a rule of evidence and not with a question of substantive law, and that therefore it would be certainly proper and we certainly would have the authority to extend the effect of this bill to all contracts now in existence and those under dispute. I think as a matter of law it can be done, and I think it should be considered.

Another point, Mr. Chairman, that we had better question some of the witnesses on is the sharp question of a mixed question of law and fact. The contracting officer may say, "Yes, but this is a mixed question of law and fact, and this bill doesn't apply." I think we should develop that in the course of the hearing.

Mr. GRAHAM. For the benefit of the witnesses this afternoon, we have before the House a very important bill, the "West Point of the Air." Undoubtedly, there will be a quorum call and also a rollcall. We know we have a large number of witnesses, and we want to accommodate you the best we can. May I take a poll of the committee. First of all, would you be willing to sit this afternoon, realizing you may be called back and forth for rollcall and quorum call, or would you prefer to go over until tomorrow and sit continuously all day, with the hope there would be no interruption?

We are trying to accommodate the witnesses as best we can. We know there are many witnesses, but it is very irritating to run back and forth to answer these calls. What do you say, Mr. Hyde?

Mr. HYDE. Whatever is the pleasure of the committee is satisfactory to me.

Mr. GRAHAM. When we quit today, we will quit promptly at 11:45, in order that everyone will get over there, and we will resume at 10 o'clock tomorrow morning, with the expectation of going through. If

that is thoroughly understood, we will proceed with the next witness, who is Mr. E. L. Fisher, General Counsel of the General Accounting Office. Mr. Fisher, will you come forward, please.

STATEMENT OF E. L. FISHER, GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY R. F. KELLER, ASSISTANT TO THE COMPTROLLER GENERAL

Mr. FISHER. Mr. Chairman, I have a prepared statement, but before reading my prepared statement I would like to correct an impression that is in the record now, and that is the statement in the Comptroller General's letter of December 30, 1953, that the chairman of the full committee read a moment ago that we had reason to believe that the Associated General Contractors of America had no objection to the so-called substitute language. We were under the impression they had no objection, but we were mistaken. I think perhaps they do. I just want the record to show that we retract any implication in that letter as to them.

I appreciated the opportunity to appear today because the subject matter of this hearing is of vital importance not only to the General Accounting Office but to the entire Government.

The Budget and Accounting Act of 1921 and the Budget and Accounting Procedures Act of 1950 vest authority in the Comptroller General of the United States as the agent of the Congress, to examine and audit the financial transactions of the Government. By section 305 of the earlier act, Congress provided that claims by and against the United States and all accounts whatever in which the Government of the United States is concerned shall be settled and adjusted in the General Accounting Office.

It has generally been regarded, by force of the terms of these statutes that payments made by public officers in the transaction of the Government's business were subject to a determination by the General Accounting Office, as to the legal propriety thereof—that such payments were not final until settled by the General Accounting Office. Accordingly, in transactions involving an expenditure of public funds the General Accounting Office has determined the actual conditions underlying the terms of any contractual agreement and if, upon the facts developed, it appeared that a contractor had been unjustly enriched at the public expense, the General Accounting Office would take the necessary action to recover any amount overpaid. By the same token, a contractor who felt he was entitled to an additional amount under a contract could present a claim to the General Accounting Office for settlement, irrespective of the administrative action taken in the matter.

Mr. CELLER. Will you pardon me at that point. How long would it take before the General Accounting Office would act?

Mr. FISHER. That would vary, I would say, from 1 day to several years.

Mr. CELLER. I would say the emphasis is on the several years.

Mr. GRAHAM. Go ahead and finish your statement.

Mr. FISHER. This authority must exist consistent with the directions in section 305 of the 1921 act that all accounts and claims shall be adjusted and settled in the General Accounting Office. This is pre-

cisely the same authority heretofore exercised by the courts and, of course, contractors have a right of appeal to the courts from the determinations of the General Accounting Office.

It has been customary in Government contracts to provide that all disputes concerning questions of fact arising under the contract shall be decided by the contracting officer whose decision shall be final and conclusive between the parties subject to the right of the contractor to appeal to the head of the agency concerned within a limited period of time. In the past, questions of fact so decided were not disturbed by the General Accounting Office or the courts unless the action of the administrative officer was fraudulent, arbitrary, capricious, grossly erroneous, or without foundation in fact. However, in the recent case of *United States* v. *Wunderlich*, the Supreme Court held that under such contract provision the decision of the deciding official on a question of fact remains final "unless it was founded on fraud, alleged and proved." In this regard the Court stated that—,

> fraud is in essence the exception. By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract.

The Court went on to say that—

> If the conclusiveness of the findings under article 15 is to be set aside for fraud, fraud should be alleged and proved, as it is never presumed. * * * The finding of the Court of Claims was that the decision of the department head was "arbitrary," "capricious," and "grossly erroneous." But these words are not the equivalent of fraud, * * * The limitation upon this arbitral process is fraud, placed there by this Court.

It is significant that the Court went further to state, possibly as an invitation but certainly as indicating a remedy, that—

> If the standard of fraud that we adhere to is too limited, that is a matter for Congress.

For all practical purposes this means that the decision of the administrative officials nearly always will be final because of the extreme difficulty of proving fraud. Its more serious implications are summed up by Mr. Justice Douglas, in his strong dissenting opinion, wherein he stated:

> But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse, or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected.
>
> The principle of checks and balances is a healthy one. An official who is accountable will act more prudently. A citizen who has an appeal to a body independent of the controversy has protection against passion, obstinacy, irrational conduct, and incompetency of an official. * * * The rule we announce makes Government oppressive. The rule the Court of Claims espouses gives a citizen justice even against his government.

In Mr. Justice Jackson's dissent he stated:

> But one who undertakes to act as a judge in his own case or, what amounts to the same thing, in the case of his own department, should be under some fiduciary obligation to the position which he assumes. He is not at liberty to make arbitrary or reckless use of his power, nor to disregard evidence, nor to shield his department from consequences of its own blunders at the expense of contractors. * * * I still believe one should be allowed to have a judicial hearing before his business can be destroyed by administrative action, although the Court again thinks otherwise.

And of course the rule works both ways. A deciding administrative official can make decisions adverse to the Government as well as to contractors, in which event an improper decision results in a burden to the taxpayers of the country. The experience of the General Accounting Office has been that this is not an infrequent situation. With the support of the Supreme Court decision and the knowledge that their determinations cannot be questioned, in the absence of fraud, this situation may arise with more frequency.

Of perhaps more serious consequence, however, is the tendency on the part of some executive contracting agencies to include in Government contracts a provision specifying that all disputes, whether of law or fact, are to be finally and conclusively settled administratively, rather than by the accounting officers or the courts. The validity of an "all disputes" clause of that nature was upheld by the Supreme Court in the case of *United States* v. *Moorman*. Speaking of such provisions, the Court stated that "No congressional enactment condemns their creation or enforcement," and that "If parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of Government." But again, as was the case with the "disputed questions of fact" provision, prior to the decision of the Supreme Court in the Wunderlich case the courts had been understood to have qualified the "all disputes" provisions by requiring that the administrative decision, in order to be conclusive, must be made in good faith and not be arbitrary or capricious.

Applying the rationale of the Supreme Court's decisions in the Wunderlich and Moorman cases, it appears that the executive contracting agencies without specific legislation authorizing them to do so, may, by agreement with the contractor, circumvent the operations of courts and the General Accounting Office to the serious detriment of both private business and the Government. Thus, the rule now made clear by the Supreme Court could result not only in depriving the Congress of the normal safeguards inherent in an audit by the General Accounting Office of public expenditures but also could preclude contractors of their usual remedy to pursue claims before the General Accounting Office. Manifestly, this unique position now enjoyed by the contracting agencies is contrary to the established policies of our Government and represents an unwarranted encroachment upon the control by the Congress over public expenditures. It is imperative, considering the billions of dollars now being spent under contracts, that there be enacted legislation limiting this final authority the contracting agencies have taken upon themselves by the use of finality clauses.

Since it has been the policy of our system of Government to afford an independent review of administrative expenditures, by the accounting officers, I strongly recommend that the Congress enact S. 24 as passed by the Senate, or, as an amendment of S. 24, the substitute language set forth in the Comptroller General's letter of December 30, 1953, to the chairman, Committee on the Judiciary, House of Representatives.

The enactment of a bill in either form would preclude administrative officers from making final decisions in contract matters on questions of law but would leave such final decisions for determination by

the General Accounting Office and the courts. On the other hand, it would permit them to make determinations on questions of fact which would have final effect if the decisions were not found by the General Accounting Office or the courts to be fraudulent, arbitrary, capricious, and so forth. Such a law not only would protect a contractor from fraudulent, arbitrary or capricious action by giving him, in addition to resort to the courts, a further administrative remedy before the General Accounting Office, and would also provide a protection, through the General Accounting Office, against decisions adverse to the interests of the United States. Certainly the rights of contracts and the Government to review or appeal should be coextensive.

Mr. Robert Keller, Assistant to the Comptroller, is with me this morning. We would be glad to answer any questions you may have.

Mr. GRAHAM. Mr. Walter.

Mr. WALTER. I notice on page 2 of your statement, second paragraph, that "It has been customary in Government contracts to provide that all disputes * * *" and so on. Is it not a fact that a contract is not negotiated in the usual manner? Is it just submitted to the contractor, is it not? The terms are all provided by the Government, and he either takes it or leaves it?

Mr. FISHER. That is generally true, Mr. Walter. These are standard forms that are generally used, and they have to be accepted without change as the usual rule.

Mr. WALTER. I would like to get around to that standard form. Where does the authority come from for article 15, the article with respect to disputes?

Mr. FISHER. There is no statutory authority for the article. It has just grown up from practice.

Mr. WALTER. Just one of those bureaucratic Topsys.

Mr. KELLER. Mr. Walter, it might be what you would call the inherent right of a contracting party to enter into certain terms. I will agree with you——

Mr. WALTER. Now wait a minute. Inherent right of a party to enter into certain terms. The contractor has no voice in what that article contains, has he?

Mr. KELLER. Well, he has a voice, but sometimes it cannot be heard very loudly. I have heard many of them protest.

Mr. WALTER. Will you give us a case where it has ever been heard?

Mr. GRAHAM. You mean above a murmur.

Mr. WALTER. A whisper.

Mr. KELLER. Offhand, I can't, but there are variations made from time to time in special cases.

Mr. WALTER. At the end of the statement it says:

> The enactment of a bill in either form would preclude administrative officers from making final decisions in contract matters on questions of law.

What about where the question was purely one of fact?

Mr. FISHER. I go on to say that where it is purely a question of fact they can still make final determinations, but if they are arbitrary, capricious, grossly erroneous, and so forth, the General Accounting Office or the courts could review.

Mr. WALTER. The position the General Accounting Office is taking on this matter is the same position it took with respect to the Contract

Settlement Act, which position was rejected by this committee some years ago; is that not a fact?

Mr. FISHER. I would say that is substantially correct.

Mr. GRAHAM. Mr. Keller, is there anything you wish to say?

Mr. KELLER. I just want to add one thing, Mr. Chairman. The Comptroller General asked me to express to the committee that he is strongly in favor of legislation on this subject. It is in the interest of the Government and in the interest of the contractors, and very frankly we do not see how any reasonable person can have any objection to it, unless they expect to get an advantage from it some way.

Mr. WALTER. Now that is just not fair, and you know it is not fair. I resent it, because I do not agree with you at all.

Mr. KELLER. I am talking about the general approach of the legislation.

Mr. WALTER. You said anybody that took that position was interested in getting an unfair advantage.

Mr. KELLER. I did not intend it that way.

Mr. WALTER. That is exactly what you said, and I don't like it.

Mr. KELLER. I will apologize to you, sir.

Mr. GRAHAM. Anything further?

Mr. KELLER. No, sir.

Mr. GRAHAM. You cannot satisfy all of us.

(The prepared statement of Mr. Fisher follows:)

STATEMENT OF MR. E. L. FISHER, GENERAL COUNSEL OF THE GENERAL ACCOUNTING OFFICE

I appreciate the opportunity to appear today because the subject matter of this hearing is of vital importance not only to the General Accounting Office, but to the entire Government.

The Budget and Accounting Act, 1921 (42 Stat. 24), and the Budget and Accounting Procedures Act of 1950, approved September 12, 1950, Public Law 784, vest authority in the Comptroller General of the United States, as the agent of the Congress, to examine and audit the financial transactions of the Government. By section 305 of the earlier act, Congress provided that claims by and against the United States and all accounts whatever in which the Government of the United States is concerned shall be settled and adjusted in the General Accounting Office.

It has generally been regarded, by force of the terms of these statutes, that payments made by public officers in the transaction of the Government's business were subject to a determination by the General Accounting Office, as to the legal propriety thereof—that such payments were not final until settled by the General Accounting Office. Accordingly, in transactions involving an expenditure of public funds the General Accounting Office has determined the actual conditions underlying the terms of any contractual agreement and if, upon the facts developed, it appeared that a contractor had been unjustly enriched at the public expense, the General Accounting Office would take the necessary action to recover any amount overpaid. By same token, a contractor who felt he was entitled to an additional amount under a contract could present a claim to the General Accounting Office for settlement, irrespective of the administrative action taken in the matter. This authority must exist consistent with the directions in section 305 of the act, supra, that all accounts and claims shall be adjusted and settled in the General Accounting Office. This is precisely the same authority heretofore exercised by the courts and, of course, contractors have a right of appeal to the courts from the determinations of the General Accounting Office.

It has been customary in Government contracts to provide that all disputes concerning questions of fact arising under the contract shall be decided by the contracting officer whose decision shall be final and conclusive between the parties subject to the right of the contractor to appeal to the head of the agency con-

cerned within a limited period of time. In the past, questions of fact so decided were not disturbed by the General Accounting Office or the courts unless the action of the administrative officer was fraudulent, arbitrary, capricious, grossly erroneous, or without foundation in fact. However, in the recent case of *United States* v. *Wunderlich* (342 U. S. 98), decided November 26, 1951, the Supreme Court held that under such contract provision the decision of the deciding official on a question of fact remains final "unless it was founded on fraud, alleged and proved." In this regard the Court stated that "fraud is in essence the exception. By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract." The Court went on to say that "if the conclusiveness of the findings under article 15 is to be set aside for fraud, fraud should be alleged and proved, as it is never presumed. * * * The finding of the Court of Claims was that the decision of the department head was 'arbitrary,' 'capricious,' and 'grossly erroneous.' But these words are not the equivalent of fraud * * *. The limitation upon this arbitral process is fraud, placed there by this Court." It is significant that the Court went further to state, possibly as an invitation but certainly as indicating a remedy, that "if the standard of fraud that we adhere to is too limited, that is a matter for Congress."

For all practical purposes this means that the decision of the administrative officials nearly always will be final because of the extreme difficulty of proving fraud. Its more serious implications are summed up by Mr. Justice Douglas, in his strong dissenting opinion, wherein he stated, "But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse, or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected.

"The principle of checks and balances is a healthy one. An official who is accountable will act more prudently. A citizen who has an appeal to a body independent of the controversy has protection against passion, obstinacy, irrational conduct, and incompetency of an official. * * * The rule we announce makes government oppressive. The rule the Court of Claims espouses gives a citizen justice even against his Government." In Mr. Justice Jackson's dissent he stated, "But one who undertakes to act as a judge in his own case or, what amounts to the same thing, in the case of his own department, should be under some fiduciary obligation to the position which he assumes. He is not at liberty to make arbitrary or reckless use of his power, nor to disregard evidence, nor to shield his department from consequences of its own blunders at the expense of contractors. * * * I still believe one should be allowed to have a judicial hearing before his business can be destroyed by administrative action, although the Court again thinks otherwise." And of course the rule works both ways. A deciding administrative official can make decisions adverse to the Government as well as to contractors, in which event an improper decision results in a burden to the taxpayers of the country. The experience of the General Accounting Office has been that this is not an infrequent situation. With the support of the Supreme Court decision and the knowledge that their determinations cannot be questioned, in the absence of fraud, this situation may arise with more frequency.

Of perhaps more serious consequence, however, is the increasing tendency on the part of some executive contracting agencies to include in Government contracts a provision specifying that all disputes, whether of law or fact, are to be finally and conclusively settled administratively rather than by the accounting officers or the courts. The validity of an "all disputes" clause of that nature was upheld by the Supreme Court in the case of *United States* v. *Moorman* (338 U. S. 457). Speaking of such provisions, the Court stated that "no congressional enactment condemns their creation or enforcement" but that "if parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government." But again, as was the case with the "disputed questions of fact" provision, prior to the decision of the Supreme Court in the Wunderlich case, supra, the courts had been understood to have qualified the "all disputes" provisions by requiring that the administrative decision, in order to be conclusive, must be made in good faith and not be arbitrary or capricious.

Applying the rationale of the Supreme Court's decisions in the Wunderlich and Mooruan cases, supra, it appears that the executive contracting agencies without specific legislation authorizing them to do so, may, by agreement with the contractor, circumvent the operations of courts nnd the General Accounting Office to the serious detriment of both private business and the Government. Thus, the rule now made clear by the Supreme Court could result not only in depriving the Congress of the normal safeguards inherent in an audit by the General Accounting Office of public expenditures but also could preclude contractors of their usual remedy to pursue claims before the General Accounting Office. Manifestly, this unique position now enjoyed by the contracting agencies is contrary to the established policies of our Government and represents an unwarranted encroachment upon the control by the Congress over public expenditures. It is imperative, considering the billions of dollars now being spent under contracts, that there be enacted legislation limiting this final authority the contracting agencies have taken upon themselves by the use of finality clauses in contracts.

Since it has been the policy of our system of Government to afford an independent review of administrative expenditures, by the accounting officers, I strongly recommend that the Congress enact S. 24 as passed by the Senate, or, as an amendment of S. 24 the substitute language set forth in the Comptroller General's letter of December 30, 1953, to the chairman, Committee on the Judiciary, House of Representatives.

The enactment of a bill, in either form, would preclude administrative officers making final decisions in contract matters on questions of law but would leave such final decisions for determination by the General Accounting Office and the courts. On the other hand, it would permit them to make determinations on questions of fact which would have final effect if the decisions were not found by the General Accounting Office or the courts to be fraudulent, arbitrary, capricious, etc. Such a law not only would protect a contractor from fraudulent, arbitrary or capricious action by giving him, in addition to resort to the courts, a further administrative remedy before the General Accounting Office, a time-saving and less expensive proceeding, but would also provide a protection, through the General Accounting Office, against decisions adverse to the interests of the United States. Certainly the rights of contractors and the Government to review or appeal should be coextensive.

Mr. GRAHAM. We will now call Mr. U. Bonnell Phillips.

STATEMENT OF U. BONNELL PHILLIPS, ASSISTANT TO THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. PHILLIPS. My name is U. Bonnell Phillips. I am an assistant to the Assistant Attorney General in charge of the Civil Division, Department of Justice.

Mr. Chairman, in response to this committee's earlier request that the Department of Justice comment on the bills H. R. 1839 and S. 24——

Mr. WALTER. Are they identical bills, Mr. Phillips?

Mr. PHILLIPS. Yes, sir. They were introduced as companion bills—a communication dated July 28, 1953, was addressed to the Honorable Chauncey W. Reed by Deputy Attorney General William P. Rogers. That communication, which I assume will become a part of the record in these proceedings, reiterated in very summary form certain views advanced by the Department of Justice in the hearings held before a subcommittee of the Senate Judiciary Committee in February and March of 1952 on S. 2487 of the 82d Congress. Since I assume this background material is available to the committee, I shall not attempt a repetition of such testimony.

In the Department's communication of July 28, 1953, to which I have referred, it was noted that S. 24 as it passed the Senate, and

H. R. 1839, contained a provision not present in the 82d Congress bills. I refer, of course, to the specific reference made in the 83d Congress bills to the Office of the Comptroller General, the General Accounting Office.

Now, there have been other developments in this field which were not traced in our July 1953 communication. The General Services Administration, which under the authority of the Federal Property and Administrative Services Act of 1949, and certain provisions of the Federal Code of Regulations, prescribes standard form Government contracts for use by all civilian Federal agencies, amended by its General Regulation No. 13, Supplement No. 1, dated June 19, 1953, the very provision under interpretation in the Wunderlich case. The disputes clause as prescribed by the General Services Administration for all construction contracts now reads that the decision of the head of the department involved concerning a disputed question of fact shall be final and conclusive unless a court shall find it to have been "fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith."

Similarly, on September 15, 1952, the Defense Department revised the disputes clause formerly incorporated in its supply and construction contracts to provide that the decision of the Secretary of Defense or his duly authorized representative may be overturned by a court of competent jurisdiction if that decision is found to be, and I quote again, "fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith."

Obviously, therefore, in respect of contracts containing either of these modified finality clauses, there can be no future reliance in their interpretation on the Wunderlich case. Moreover, if it be considered that the Wunderlich decision established a rule of interpretation of finality clauses different from and more stringent than the long line of Supreme Court decisions beginning with the Kihlberg case in 1878, there can be no reliance even upon such decisions as Kihlberg, Martinsburg & Potomac Railroad Company v. Marsh and the numerous and uniform Supreme Court decisions which follow those cases.

Now, these developments in our opinion have been sufficient to raise some question as to the present necessity for legislation in this field, even assuming such legislation to be otherwise desirable.

Mr. WALTER. May I interrupt at that point? Do you take the position that the revised section 15 contains language which has the effect of overruling this line of decisions that you have just mentioned?

Mr. PHILLIPS. Yes, sir. The rule laid down by the Supreme Court in the Kihlberg case, and we think unanimously followed in almost a score of decisions since that case and up to Wunderlich, was that the decision of the head of the department concerned—I do not refer to the contracting officer, but to the head of the department concerned—under the contract was final and conclusive, unless it could be shown that it was fraudulent or so grossly erroneous as necessarily to imply bad faith.

Mr. WALTER. Then I take it from that that the Government feels it is desirable in the interest of fair play to have this revised language in article 15?

Mr. PHILLIPS. I think there is no question of that in respect of those who changed the forms.

Mr. WALTER. If that is the fact, do you not think in carrying out our idea of a government of laws and not of men that it ought to be enacted into the law, so that tomorrow some other man might not change it?

Mr. PHILLIPS. I recognize, sir, that the present standard forms are not immutable but that they could be reversed, though I think it hardly likely in the present climate of opinion and the strong reaction which has generally prevailed with respect to the Wunderlich decision.

Mr. CELLER. Tomorrow the General Services Administration could change that regulation.

Mr. PHILLIPS. I quite agree, sir.

Mr. CELLER. The Department of Defense could change that regulation.

Mr. PHILLIPS. Yes, sir, I quite agree. I also think that there may be areas not covered by the changes in the Defense Department and General Services Administration contracts. I am not too well versed on that, but I note that the General Services amendment related only to construction contracts and may not apply to supply contracts.

Mr. WALTER. Before you go on, may I ask just one more question. In your opinion, what contracts would be covered by any legislation that we would enact?

Mr. PHILLIPS. That is a point on which we have something to say, sir. We don't know. The language of the bills under consideration by the committee seems indefinite on the point.

Mr. WALTER. All of them are indefinite except for Mr. Celler's bill, H. R. 3634, which has specific provision for retroactivity in the first full paragraph on page 2 of that bill.

Mr. PHILLIPS. In the 1952 hearings it was stated on behalf of our Department, and I quote:

> The Department of Justice is not a procurement agency and does not regard itself as an authority in the field of procurement.

While, therefore, the Department desires to be of assistance to this committee, we believe that there are others present who are versed in the field of procurement, and that they can better advise the committee as to what the future procurement and contracting policy of the Government should be. In this respect, the Department feels compelled, however, to express its concern lest possible future legislation in this area be construed to impair presently existing contract rights of the Government as expressed in contracts now in being. Let it be at once stated that with the exception of H. R. 3634, there is no indication——

Mr. CELLER. Could you amplify that last statement a little bit—"lest possible futnre legislation in this area be construed to impair presently existing contract rights"? Will you give us a little more of your views on that?

Mr. PHILLIPS. Yes, sir. I think my prepared statement will cover that.

With the exception of H. R. 3634, there is no indication and probably no possibility in respect of any of the other bills under consideration that matters now at rest, either because of the contractor's failure to avail himself of the 30-day appeal period to the head of the department concerned or through a ruling of the head of the

department concerned on an appeal, could be reopened. We think it must be realized, however, that there is possibility under any of the bills now subject to consideration of a construction which would impair the Government's rights in contracts now in being but not concluded which contain finality provisions incorporated prior to the amendments effected by the Department of Defense and the General Services Administration. It is our deferential submission that such impairment should not occur. At no time has any contractor since the Kihlberg decision in 1878, and certainly not in recent years, thought that he could obtain a reversal of the decision of the head of the department concerned unless he could show that decision was fraudulent or was so grossly erroneous as necessarily to imply bad faith on the part of such an official.

Mr. Chairman, there has been strong reaction against the decision in the Wunderlich case, which has been viewed as cutting down even that test. Those in the Department of Justice most closely familiar with the Wunderlich case, which of course we tried in the Supreme Court, and its numerous predecessors, such as the Moorman case and a long line of cases, do not subscribe to the view that Wunderlich changed the law. However, we are a minority in that view. The reasons for our view were stated in the hearings 2 years ago. However, as we stated in those hearings, the Department of Justice would have no possible objection and would welcome a congressional declaration with respect to existing contracts that the words "such gross error as necessarily to imply bad faith" still constitute a part of the rule. Beyond this, however, we submit that legislation should not impair existing contracts openly and validly arrived at.

The bargain made between the Government and the contractors under the old article 15 and its counterparts was that the Government should be bound by the decisions of its contracting officer and should have no appeal rights therefrom, whereas the contractor should have a right of appeal to the head of the department concerned or his designate, who could bring to the judgment of that dispute all the expert knowledge he has acquired in the field.

Mr. WALTER. Mr. Phillips, in any of the decisions has this strong language defining fraud that is used in the Wunderlich case been employed?

Mr. PHILLIPS. Since the Wunderlich case?

Mr. WALTER. No, before that, in that line of decisions going all the way back.

Mr. PHILLIPS. No, not the specific language used in the Wunderlich case.

Mr. WALTER. What I have reference to is "by fraud we mean conscious wrongdoing, an intention to cheat or be dishonest." Has that language been employed in any of the other cases?

Mr. PHILLIPS. No. The standard before that was that the decision was reversible for fraud or such gross error as necessarily to imply bad faith. Now, we think that there is a sentence in the Wunderlich case which precedes the language you have just quoted which I will attempt to quote: In *Ripley* v. *United States*, we (the Supreme Court) equated gross error necessarily implying bad faith to fraud. Now, if that sentence is to be given meaning, and we feel under the standard rules of construction it should be given meaning, we think

what was being said there was that the test remained the same. We also think that the Wunderlich decision is to be viewed in the light of the history of these cases. There are many of them. They came up to the Supreme Court seriatim for a number of years, and we believe that the Wunderlich decision represents something of reaction by the Supreme Court to the fact that they thought they had disposed of this question perhaps more than once before they were again confronted with the Wunderlich case. So that the language is sharp. It has, as I say, created a strong reaction against it, and we have no objection to a congressional declaration that the test has always been that in the Kihlberg case and all cases since them. We so stated in the 1952 hearings.

Mr. WALTER. Mr. Phillips, why would certiorari have been granted if the Supreme Court felt that this question had been disposed of so often? What I am getting at is this: I think that by granting certiorari and going into what appears to be the same matter, and then a decision with this language, the Court intentionally went further than was the law before. After all, you know what percentage of cases are granted certiorari, and I just cannot imagine their allowing certiorari where they feel the case has been disposed of before. I think they deliberately set out to go farther.

Mr. PHILLIPS. Well, I do not subscribe to that view necessarily. I think you must realize that the decision in the Court of Claims was wrong in respect of the old decisions of the Supreme Court, and the Government petitioned for certiorari because we regarded the decision of the Court of Claims as wrong because of the older decisions of the Supreme Court. So that it was a grant of the Government's petition to reverse the holding of the Court of Claims that occurred. I think the Supreme Court almost had to do that because of the misunderstanding of the rule laid down by the Supreme Court in the earlier cases. I think that possibly accounts for the fact that they granted certiorari.

Mr. WALTER. Why would they have gone this far with the language if it was not intended to change the rule?

Mr. PHILLIPS. Well, they did cite in their Wunderlich decision certain other cases. That is one of the reasons why I believe they did not intend a change in the law, although the language was sharp and almost biting. However, I think we are beyond that point, sir. It is an academic dispute now, and if there can be no awaiting of clarification from the Supreme Court, as I say it might well be the sense of this committee to pass a declaration that at the very minimum the rule was as it always has been in the Kihlberg case.

In so stating we do not mean to suggest that the disputes clause, the old disputes clause, did not have its uses. These are of many, many years standing, and I do not think it can be suggested that there is anything un-American in this attitude of the Supreme Court. After all, the Supreme Court has held that this is the rule for many years. It is in essence an expression of freedom of contract if the parties can agree that they will be bound by the arbitral decision of a third party. Now, the difficulty with the clause that has been put forward is that it vests the arbitral decision in the hands of one of the parties to the contract. If that is against public policy, it would be perhaps proper to provide for legislation that no such contract, either between private

parties or Government contracts, should be enforceable. There is one State, I believe, Indiana, which holds that this is against public policy. However, the courts of other States, insofar as I am aware, have not so held, and certainly the Supreme Court has not so held, because it has faced this provision for many years in numerous decisions.

Mr. WILLIS. May I ask a question at that point, Mr. Chairman? The Supreme Court said: "The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract." True, the Supreme Court gave effect to the plain meaning of the contract, but you yourself said that the General Services Administration since that decision has toned down article 15, and thereby admits that the Supreme Court went a little strong. Would that not be the implication of the change?

Mr. PHILLIPS. I cannot speak for the General Services Administration.

Mr. WILLIS. They changed the contract since the decision, and there must have been a reason for it.

Mr. PHILLIPS. I quite agree, and I think the reason is the strong reaction against the Wunderlich decision.

Mr. WILLIS. In the dissenting opinions it was clearly pointed out that the preparation and perfection of the contract was not a two-way deal, and that it was brought about and built up by bureaucratic assemblage of language, rather as a one-sided proposition. So that, true, the Supreme Court gave effect to the meaning of the contract as written, but it was not prepared at sword's point between two lawyers. I cannot get out of my mind that that is the thought of this whole thing.

Mr. CELLER. The Supreme Court said: "Respondents were not compelled or coerced into making the contract. It was a voluntary undertaking on their part."

Is that exactly so? Can you say it is purely voluntary on the contractor's part? Here is a contractor seeking to get a certain amount of business from the Government, this vast, great Government dealing with an individual. Can you say that it was purely a voluntary act on the part of the contractor to accept this clause? Do you not think the Supreme Court was a little in error in that language? The contractor had no choice. He had to accept it or reject it, of course.

Mr. PHILLIPS. That is quite true, sir.

Mr. CELLER. Sometimes the rejection of the contract might mean a great loss to the contracting party who may be in dire need of that kind of work involved in the contract.

Mr. PHILLIPS. Economic duress is what you are suggesting.

Mr. CELLER. And then the Court said the following, which I think does away with the idea that regulation might give us remedy. The Court said:

> If the standard of fraud that we adhere to is too limited, that is a matter for Congress.

That is what we are here for, to follow the suggestion of the Supreme Court and change this matter and embed it in our statutes rather than relying on regulations.

Mr. PHILLIPS. The Department differs in no way from your position. We have said, and I will repeat again, that we are not in the procurement field, and the question of procurement policy is one that we have no expertise in. We, however, were faced with the Wunder-

lich case when it came up. We have vindicated what we thought were the Government's contract rights in that case, and we only suggest to this committee that we would deplore legislative impairment of those contract rights as they now exist in contracts in being which have not been concluded. The remedy is to remove any ambiguity from the bill. Taking S. 24 as an example, we would recommend a change in line 3, page 1, which now reads:

That no provision of any contract entered into by the United States * * *

We do not say that this will have a retroactive effect, but we believe in order to protect the Government's rights which are contractual in nature that it would be better to insert some language in that line so that the provision would read:

That no provision of any contract entered into after the effective date of this act by the United States * * *

That would leave the parties as they now stand, and certainly, as I say, no contractor could have thought when he entered into the contract or when he made his bid on the contract that he was going to have more freedom of appeal to the courts than was established by the Kihlberg decision in 1878 and on down through the years.

We regard it as in essence a matter of contract, and we have no quarrel with any future change as to future contracts at all that may be advisable. We think there is some benefit to be derived from the old article 15, in that it put a speedy and inexpensive stop to these disputes after they had reached an expert body. We believe that we gave a quid pro quo, although of course the Department of Justice had nothing to do with the drafting of article 15. We are only here to assert our contract rights as any other lawyer would do. We believe that there was a quid pro quo, in that we gave up any right of appeal from the contracting officer's decision, whereas the contractor by the language of article 15 was given a right of appeal to the head of the department concerned.

Mr. CELLER. Suppose there is a contract in dispute now. Would you have the bill cover that?

Mr. PHILLIPS. I would not, sir, because I think the parties with open eyes knew what the result would be.

Mr. CELLER. Why with open eyes? They were confronted with that clause, and as I said before they didn't have any choice. They had to take it or leave it.

Mr. PHILLIPS. That would be true, sir, of any provision of their contract, not only with respect to article 15. They might like to rewrite any number of provisions in their contracts, but they chose to bid on their contracts and knew what they were coming into. And it was strongly intimated in the 1952 hearings by certain representatives of contractors that the fact that article 15 was in there would be reflected in their bids; that they would want to have a contingency in their bids to take care of any possible results of article 15 which they would not like.

Mr. CELLER. I personally am not inclined to agree with you on that. I think everybody should have their chance in this matter, and particularly in those cases where a dispute is pending.

Mr. WALTER. Mr. Phillips, do you take the position that the Wunderlich case in nowise affected existing law, that is, the law as it was understood to be at the time of the decision?

Mr. PHILLIPS. That is our reading of the Wunderlich case. However, as I said, we are in a minority.

Mr. WALTER. Let me call your attention to the fact that other people do not share that opinion.

Mr. PHILLIPS. Yes, sir.

Mr. WALTER. This is what the Court of Claims said in *Palace Corporation* v. *The United States:*

> The Supreme Court in construing the standard form of Article 15 has now limited the scope of review of the decisions of heads of departments—

and so on. So you see the Court of Claims takes a different position.

Mr. PHILLIPS. The Court of Claims took a position in the Moorman case and in many cases before that in which the Supreme Court told them it was not the law with respect to those contracts.

Mr. WALTER. Then they went on to say:

> It would be a sheer waste of time and energy of the court and the litigants to hear evidence beyond the limits of the blueprint clearly drawn by the highest judicial authority—

of course referring to the Wunderlich case, so apparently, if you are right, the Court of Claims has been misled.

Mr. PHILLIPS. Well, the Court of Claims was reversed in a number of these cases.

Mr. CELLER. If we accept the Senate bill, do you think we should also include the provision in my bill that chapter 91 of title 28 of the United States Code be amended by adding at the end the following:

> This section shall not apply with respect to any such decision which became final more than one year before the date of enactment of this section.

Mr. PHILLIPS. We would respectfully oppose that provision.

Mr. CELLER. You would oppose that language?

Mr. PHILLIPS. We think that vast confusion would arise if that becomes part of the law. With regard to all these matters which have been set at rest, either by the contractor's failure to appeal within the 30 days allowed him in his contract to the head of the department concerned, or by the fact that the head of the department concerned has acted on the matter, you are asking for reopening of all those matters.

And not only do we regard it as in derrogation of the United States contract rights, but productive of possible confusion.

Mr. CELLER. My idea is to give the right to all the cases that are pending. Where the money has not been finally accepted as consideration and no final payment has been made, I think the cases should be held open. But then I think there should be some type of a statute of limitations of the sort that I inserted there—1 year.

Mr. PHILLIPS. Well, sir, our position on this particular provision of your bill follows necessarily from our position that we should not have legislative impairment of contracts in being.

Mr. CELLER. If you are going to give the right, give it all the way and do not just chop it in half and give it to some and not to others.

Mr. PHILLIPS. We favor a bill, if any, which would say that no longer can this be the rule of law as to contracts entered into the minute after the passage of any legislation.

Mr. CELLER. If this legislation is sound, it should have been adopted immediately after the Wunderlich case, it that not correct? Now,

there has been delay. In the interim, contracts have been entered into and they contain the obnoxious clause. Those contractors who signed contracts with that obnoxious clause in that interim are penalized if they are not to be embraced within the remedy prescribed by this new legislation.

Mr. PHILLIPS. I would not see how they were penalized, because I don't see how they could rely on any action of Congress taken to forbid the use of article 15 in a contract. They could not rely upon a change of the law. So when they went into those contracts, they went in with the knowledge of the Wunderlich decision and they openly arrived at these contracts.

Mr. CELLER. Why could it not be said with equal grace that they relied upon the surety of the passage of the legislation because bills were offered immediately after the Wunderlich case, and that is the fact.

Mr. PHILLIPS. Yes. But just as the Supreme Court doesn't always grant certiorari, I don't think the Congress always passes bills.

Mr. HYDE. Mr. Phillips, is it not possible under the section referred to by Mr. Celler in his bill to go into cases which have been closed as far as the Department is concerned back further than 1 year? That is the section which states:

> This section shall not apply with respect to any such decision which became final more than 1 year before the date of enactment of this section.

Mr. PHILLIPS. I think that is a possible interpretation of it. I don't want to say so because we will be hoisted by our own petard if we come to Court.

Mr. HYDE. The feeling is that there is a great deal of ambiguity in that.

Mr. PHILLIPS. Precisely. Now, I do want to make some mention of the question of the degree of impairment of the Government's contract right that might possibly occur. We cannot predict with certainty what will occur because if we predict the most dire consequences, future Court decisions could hold up to us our prediction saying "You foresaw this." So we are not going to predict anything particularly, sir.

The words "grossly erroneous" and "reliable probative and substantial evidence" as now employed in S. 24 I think it will be admitted are difficult of precise definition, as are the words "arbitrary and capricious" which find their way into other drafts of proposed legislation in this field.

With respect to these latter words, "arbitrary and capricious," there is as a possible source of guidance the decision in *United States* v. *Carmack*, 329 United States 230, wherein the Supreme Court makes some attempt at a definition in pages 243 to 246 of that decision.

The Department, however, in other fields has not been conspicuously successful in holding the definition to that arrived at in the Supreme Court in that case.

Turning, however, to S. 24 in the committee report, as it came out of the Senate—that is, Senate Committee Report No. 32, 83d Congress, 1st session—we find no help at all in determining whether there is any degree of finality at all left. The contract provision will stand, but does it mean anything any more?

I point to the last paragraph on page 2 of the committee report, and with your permission I will read the paragraph. It is a short paragraph.

> S. 24 will have the effect of permitting review in the General Accounting Office or a court with respect to any decision of a contracting officer or a head of an agency which is found to be fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative and substantial evidence. In other words, in those instances where a contracting officer has made a mistaken decision, either wittingly or unwittingly, it will not be necessary for the aggrieved party to, in effect, charge him with being a fraud or a cheat in order to effect collection of what is rightfully due.

Now, the first sentence of that paragraph repeats the language of the bill, but the second sentence raises serious questions in our mind as to what the intendent of that language is. It says:

> In other words, in those instances where a contracting officer has made a mistaken decision . . .

The result will follow.

In other words, I see the possibility, if that language is to be interpretative of the meaning of the bill, that there will be nothing at all left to finality; that there will be provided a completely de novo review in the court.

Mr. WALTER. That is exactly what that means, does it not?

Mr. PHILLIPS. Well, I thought that possibly it was not the intent of the framers of the legislation to go precisely that far.

Mr. WALTER. I am sure that is what it means. It means in every instance where the contractor feels that he has been aggrieved, he could take an appeal.

Mr. PHILLIPS. Yes, sir. But the test is whether any attention is to be paid by the court to the expert body below it which has evaluated this dispute and reached a conclusion.

Now, it is possible that the language of S. 24 could be interpreted as a substantial evidence rule or something of the sort. But with this language in the committee report, even that possibility seems dubious.

Mr. WALTER. It goes farther than the rule laid down in the Consolidated Edison case, the rule with respect to substantial evidence.

Mr. PHILLIPS. Yes—that was the National Labor Relations Board case.

The substantial evidence test has varied from statute to statute, and there are more recent decisions making the substantial evidence test possibly more substantial than the Consolidated Edison case.

Mr. WILLIS. May I ask this question. You are familiar with the proposal which has been advanced as read by the chairman. Now, I would like your views as to whether those words in the new version would more clearly fit the situation and would avoid the dangers of the use of all these words in S. 24. Are you familiar with the new proposal? How do you feel about it?

Mr. PHILLIPS. Advanced by the Comptroller General, sir?

Mr. WILLIS. Yes.

Mr. PHILLIPS. That proposal uses pretty much the words now found in the standard forms—fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. That is the language of the new bill.

Mr. WALTER. Do you agree with that?

Mr. CELLER. Does the Department of Justice agree with the words "not supported by substantial evidence?"

Mr. PHILLIPS. Our position is that we do not want to comment on that language as it will affect future contracts because we do not regard ourselves as an expert in that field. We are simply attempting to reserve the Government's present contract rights.

Mr. WALTER. You don't take the position that you are not an expert in the legal field.

Mr. PHILLIPS. I won't take that position for the Department; no, sir.

Mr. CELLER. In other words, you do not want to give an opinion on it.

Mr. PHILLIPS. However, with respect to the question of the Comptroller General being named in this bill—I do not want to burden the record. I refer you to our July 28 communication in which we have expressed some views, to wit, that the Comptroller General affords some degree of balance in protecting against possibly erroneous decisions against the Government's interest.

I want to thank the committee on behalf of the Department of Justice for the opportunity of appearing here and personally for your consideration and courtesy.

Mr. GRAHAM. Next we will hear from Mr. Leonard Niederlehner. We are not attempting to limit you, but we have 15 minutes to go before we adjourn. So I warn you now.

Mr. NIEDERLEHNER. I have just 6 pages, Mr. Chairman.

STATEMENT OF LEONARD NIEDERLEHNER, DEPUTY GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Mr. NIEDERLEHNER. Mr. Chairman, members of the committee, I appear before the committee to state the Department of Defense position with respect to a number of pending bills which relate to finality provisions in disputes clauses in Government contracts.

Government contracts have contained a provision for settlement of disputes by the head of the Government agency for a long period of time. And since the beginning of World War II, in the Department of Defense there has been a well-defined procedure for reference of appeals from decisions of contracting officers to a Board of Contract Appeals, separate from the contracting bureaus and technical services and under the direct supervision of the Secretaries of the military departments, where a fair and objective hearing is granted to contractors.

A disputes clause in contracts offers a number of advantages, both to the Government and to the contractor. For the contractor, it provides a simple, expeditious and inexpensive opportunity to be heard and a fair determination of issues in disputes. For the Government, it provide a fair and expeditious procedure for settlement of disputes, and provides for continuation of the work notwithstanding the fact that a dispute has arisen.

The provision of finality in the disputes clause is consistent with commercial arbitration proceedings. Further, the provision for finality represents an effort to limit the number of reviews, the number of times the parties must go to the expense of presenting the two sides of a dispute which may involve highly technical and complex subject matter.

The procedure for settlement of disputes has been generally acceptable to contractors, and has caused relatively little difficulty. How-

ever, in 1951, in the case of *United States* v. *Wunderlich* (342 U. S. 98), the Court appeared to limit judicial review of agency decisions under disputes clauses to cases in which fraud is affirmatively alleged and proved. This appeared to most to be a narrowing of the previous state of the law, which was generally interpreted to be that decisions of the heads of agencies would be final and conclusive unless fraudulent or so grossly erroneous as necessary to imply bad faith, or arbitrary or capricious.

After the decision of the Supreme Court in the Wunderlich case, there was inserted in the Defense Department Appropriation Act for fiscal year 1953, approved on July 10, 1952, a provision, in effect, requiring the amendment of standard contract article 15 to provide an appeal by the contractor to the Court of Claims within 90 days from the date of decision. The Department of Defense immediately modified its disputes clauses and included these modifications in the next revision of the armed services procurement regulation. In relation to those contracts containing article 15, that is construction contracts, the Department of Defense provides for the right of appeal in accordance with the statute. Moreover, the standard disputes clause contained in all contracts, including construction contracts, was amended to limit finality by providing that the decision of the head of the department would be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith. This is the provision which is now used.

We feel, therefore, that the difficulty anticipated to result from the Wunderlich case has been obviated insofar as Department of Defense contractors are concerned by the administrative change in the contract provisions relating to finality. We further feel that we have a very effective organization and procedure for granting a fair and impartial hearing and determination to an aggrieved contractor, and that this procedure is quick and inexpensive for both the contractor and the Government. It might be noted that this quick and inexpensive method of setlement of disputes is of particular advantage to small businesses whose limited capital cannot sustain the delay and expense of protracted litigation.

With respect to the various bills which have been introduced and considered, there would appear to be, in general, four basic issues: (1) The necessity for legislation; (2) If legislation is passed, the degree of finality which will be permitted; (3) The question of whether the role of the General Accounting Office should be expressed in the legislation; and (4) Whether or not it is practicable to limit finality to matters of fact as distinguished from matters of law.

As to each of these issues the views of the Department of Defense are as follows:

First, as to the necessity for legislation, we feel that the administrative arrangements which we have made are now adequate to protect the contractor. We feel that we have stipulated finality in our contracts to a degree which represents the interpretation of the courts as to finality before Wunderlich. Although we, of course, do not want to intimate that we object to judicial scrutiny of anything we do in the Department, we are concerned with the possible expense and time of personnel involved in successive reviews of disputes questions and with any possible delays in the performance of defense contracts which might result. Further, assuming that our administrative

remedy for settlement of disputes is an effective one, and we think it is, if the finality of the administrative decision is substantially reduced, and if litigation is substantially increased, then the Government must consider whether it is justified in continuing the expense of a comprehensive administrative review system.

On this point of necessity, I have some figures which I think demonstrate the fairness and effectiveness of the administrative handling of disputes. In view of the time lag between the occasion of a dispute and the final determination if it goes to court, we must select a period some time back. In the Department of the Army, which then included the Air Force, for the 9-year period from 1942 to 1950 inclusive, there were 1,994 cases before the Board of Contract Appeals of the Department of the Army.

Of these cases, roughly 50 percent were decided in favor of the contractor. Of those cases not decided in favor of the contractor, 66 cases were taken to the Court of Claims. Of these 66 cases, 27 cases did not involve hearings on merits which had been considered by the Board of Contract Appeals—that is, they were dismissed for want of jurisdiction, or went to the Court of Claims on separate issues.

Thirty-nine cases out of the sixty-six were heard in the Court of Claims on the merits, on appeal from decisions of the Army Board of Contract Appeals. Of these 39 cases, in 22 cases the Army Board of Contract Appeals was sustained and in 17 it was reversed.

Thus, for this 9-year period, there would be an average of 2 cases per year in which the Army Board of Contract Appeals was actually reversed. We do not have precise statistics on numbers of contracts per year during this 9-year period. However, on the basis of more recently available statistics we would estimate that the number of contracts entered into by the Army and Air Force would average nearly, 2 million per year.

With respect to the separate experience of the Navy Board of Contract Appeals, we have been able to trace no cases in which the Board was reversed by the Court of Claims since the establishment of this Board in 1944.

On the second of the issues listed above, as to the degree of finality, we feel that the standard should be what was generally considered to be the law before the Wunderlich case, namely, finality unless the decision is fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith.

Third, on the question of the General Accounting Office, it is my understanding that the General Accounting Office considers that it should have the same authority which it had pursuant to law before the decision in the Moorman and Wunderlich cases.

Accordingly, it is unnecessary specifically to mention the General Accounting Office in the proposed legislation, to accomplish this. Further, specifically to mention that Office might imply a new type of review of the finality of administrative decisions which conceivably could cause difficulty for contractors, particularly as far as the bankability of their contracts are concerned.

Fourth, insofar as the prohibition against finality of administrative decisions on questions of law is concerned, conceivably there could be some difficulty involved in separating issues of fact and law, for example, the application of a specification provision to a factual situation.

In conclusion, the Department of Defense does not consider that legislation on this subject is necessary.

However, if the committee should consider that limitations upon the finality of decisions under disputes clauses should be spelled out in legislation, it is respectfully submitted that the review of such decisions should be limited to courts of competent jurisdiction and that the grounds for such review should be consistent with those set forth in the disputes clause contained in the armed services procurement regulation. In this respect, it is noted that of those bills with respect to which we have been asked to comment, the bill H. R. 3634 would be so consistent.

The Bureau of the Budget has advised that it has no objection to the presentation of this statement.

Mr. GRAHAM. Are there any questions?

Mr. WALTER. I just do not follow you when you say that adequate relief is provided and for that reason there should not be legislation.

Mr. NIEDERLEHNER. I think we have, Mr. Congressman, not so much a problem of whether or not legislation should be provided, but what it will contain. And it is the difficulty of drafting the legislation which I think has raised the questions with respect to all four of these bills.

Mr. WALTER. I thought that was the philosophy of yesteryear.

Mr. NIEDERLEHNER. May I add, we think that on the bill 3634, that that generally embodies the situation which we have now undertaken to bring about administratively.

Mr. WALTER. Yes. So then you take the position that because this matter is dealt with adequately administratively, there is no need for legislation. But suppose you should be followed by somebody else that didn't subscribe to that.

You have mentioned the few cases in which there have been appeals. Is it not a fact that a great many contractors do not appeal simply because they have to settle? Their economic situations are such that they just cannot wait for their money, besides the expense.

Mr. NIEDERLEHER. If we broadened the basis of appeal, I don't think we would remedy that, sir.

Mr. WALTER. I am not so sure. I have this in mind. I believe the district courts and the courts of original jurisdiction of the United States are as good as they are because there is the possibility of appealing somewhere else if their decision is erroneous. In eliminating the possibility of an appeal, I can visualize opinions being written by office boys and charwomen.

But I do not believe that you are being consistent if you say that relief is provided for administratively; therefore there should not be any law—with our philosophy of government.

Mr. NIEDERLEHNER. Mr. Congressman, we think that there is a right of appeal to the courts under separate statutes, except to the degree that the exercise of that right is limited by the contract provisions. Now, unless we say that there will be no finality whatsoever in administrative decisions and we abolish our boards, there will always be some degree of finality, some limitation upon the review of the cases then they go to the courts. It is a question of whether there is going to be finality in any particular case or what the degree of review is which will be permitted.

Mr. WALTER. People do not take appeals just because they can. If a contractor is not treated fairly, in his own mind, why should he

not have the opportunity to present his cause as he sees fit and have some independent agency pass on the question of whether or not he is right or wrong? He is not going to take an appeal only because he can.

Mr. NIEDERLEHNER. Are we talking about the numbers, sir?

Mr. WALTER. Yes.

Mr. NIEDERLEHNER. I think that in any case at the present time where he has been treated fairly, he would not have to appeal. Where he has not been treated fairly, at least according to the criteria which we have listed, he would have the right of appeal under separate statute. So again it becomes a question of whether or not there should be no administrative finality whatsoever and that all disputes should be left to the courts, or whether we can relieve the burden of the courts, provide an expeditious method of settlement, and provide for an appeal to the courts in certain situations. We have listed some in the regulations and these bills list them.

Mr. WALTER. I have heard that argument for many years, you know. At one time or other I was interested in a bill that subsequently became the law, providing for a judicial review of decisions of administrative agencies. Your argument is typical—namely, that if the right to review is given, the courts will be clogged. It just has not happened that way.

Mr. NIEDERLEHNER. If I could suggest, sir, I think you are referring to the Administrative Procedure Act, and I don't think that an unlimited right of review is granted by that.

Mr. WALTER. No; and none of this legislation grants an unlimited right of review.

Mr. NIEDERLEHNER. None of the bills do; that is correct. And the procedure which we have is consistent with the present bills—that is generally the criteria which were provided. Therefore, the right of review exists now and will exist if legislation is passed.

Mr. HYDE. Mr. Chairman, one question. In your statement you say, "We feel that the standard should be what was generally considered to be the law before the Wunderlich case." Is not the difficulty with that, in spite of Mr. Phillips' testimony just before you, that in effect the Supreme Court has said that fraud and grossly erroneous as necessarily to imply bad faith are synonymous? Isn't that in effect what the Supreme Court said in the Wunderlich case, particularly in the section Mr. Phillips quoted which the Department of Justice interprets as meaning the Wunderlich case has not changed the law?

Mr. NIEDERLEHNER. No, sir. In the Wunderlich case there was a provision simply for finality. The Court said that finality meant finality unless there was actual fraud alleged and proved. Our clauses do not now say simply finality. They say finality unless the decision is fraudulent, arbitrary, capricious, or so grossly erroneous as to necessarily imply bad faith. We do not attempt to stipulate by the contract that there is finality of the decision if any of these criteria are present.

Mr. GRAHAM. Our time is up. For the benefit of those who are still waiting, we had 18 witnesses on the list for today and we have exhausted 6.

We will adjourn now until 10 o'clock tomorrow morning. Mr. Reed will preside.

(Whereupon, at 11:45 a. m. the committee adjourned until 10 a. m., Friday, January 22, 1954.)

REVIEW OF FINALITY CLAUSES IN GOVERNMENT CONTRACTS

FRIDAY, JANUARY 22, 1954

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 1 OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to adjournment, at 10:10 a. m., in room 346, Old House Office Building, Hon. Chauncey W. Reed (chairman) presiding.

Present: Messrs. Reed, Hyde, Willis, and Miss Thompson. Also present: Mr. William Foley, committee counsel.

The CHAIRMAN. The committee will come to order.

STATEMENT OF J. H. MACOMBER, JR., ASSOCIATE GENERAL COUNSEL, GENERAL SERVICES ADMINISTRATION

Mr. MACOMBER. Mr. Chairman, my name is J. H. Macomber, Jr. I am Associate General Counsel of the General Services Administration.

Mr. WILLIS. Do you have a prepared statement?

Mr. MACOMBER. I do not have a prepared statement. In fact, I was not going to volunteer to testify, but I am very happy to do so if the committee wishes to hear from our agency.

The CHAIRMAN. We are very happy to have you here. You may proceed.

Mr. MACOMBER. What I have to say, Mr. Chairman, will be very brief. In the first place, I want to make it clear that General Services Administration does not oppose some legislation on this subject. I would like, however, to invite the attention of the committee to a few points in regard to it. These points in brief are:

(1) That revision can be accomplished by administrative action, without legislation.

(2) That the bills before the committee do something more than restore the pre-Wunderlich rule.

(3) That the substantial evidence clause appears to provide for an appellate type of review of the administrative decision.

We feel there should be some provision in any legislation that is enacted that will serve to protect the Government in those cases where there may be excessive generosity on the part of the contracting officers, and that the prohibition against any provision for finality on questions of law raises certain problems, as we see it, and that a possible solution different from the general scope of these bills under consideration would be to authorize use in Government contracts of the usual commercial-type bilateral arbitration provision.

Now, my first point was that revision of these clauses can be accomplished by administrative action. I will concede, of course, as was pointed out yesterday, that what an agency does by administrative action today toward revising the clauses it can undo tomorrow, and that argument is undoubtedly an argument for revising the clauses or compelling their revision by legislation. On the other hand, it seems to me that one can make the argument that the criteria that should be set up for review of the contracting officers' decisions are at the present time somewhat nebulous and doubtful, and from that point of view it might be desirable to permit a little administrative experimentation before legislation is enacted.

I must admit right away that administrative limitations sometimes acquire almost as much rigidity as legislative limitations, and I am sure that some of the people who are interested in this legislation will tell you gentlemen that they have been seeking administrative revision of the disputes clause for a good many years. On the other hand, I do feel at this time that the agencies are aware that there is need for further consideration of the finality clauses and are prepared to give that consideration and to do some experimentation as to what the criteria should be under which the decision of the contracting officer, the administrative decision, may be overruled.

My second point is that the bills before the committee do something more than, as I read them, restore the pre-Wunderlich rule. Assuming in the first place that the Wunderlich decision does change the previous rule, which I think is open to argument either way, H. R. 1839 and Congressman Willis' bill, H. R. 6946, it seems to me extend the scope by the incorporation of the substantive-evidence provision. The revision proposed by the Comptroller General extends the pre-Wunderlich rule as laid down by the Supreme Court.

Mr. WILLIS. At that point, what exactly are the words of the proposal of the GAO, as compared to the words in my bill and S. 24?

Mr. MACOMBER. Mr. Congressman, I think that the GAO bill brings in "arbitrary" and "capricious" as a criterion, and the clause relating to substantial evidence is slightly different. I believe it uses only "substantial evidence" and does not bring in the adjectives "reliable" and "probative."

The revision proposed by the GAO extends the scope of the pre-Wunderlich rule in that it brings in "substantial evidence," and also that it uses the words "arbitrary" and "capricious," which as we read the pre-Wunderlich Supreme Court rule was not included as a criterion, although some of the Court of Claims decisions undoubtedly asserted the right to revise or to overrule a contracting officer's decision on the ground that it was arbitrary or capricious.

Mr. WILLIS. May I ask one question at this point so we can have your views. I know you are generally opposed to the legislation and would prefer not to have it, but assuming we go in that direction what would be your idea of the words to use instead of the words used in S. 24, my bill, or GAO's bill? What words do you think would carry out what you have in mind in order simply to go to pre-Wunderlich. You say these bills go farther.

Mr. MACOMBER. I think to restore the pre-Wunderlich rule that the grounds for overturning the contracting officer's decision should be limited to fraud or so erroneous as necessarily to imply bad faith.

I do not want to be understood as opposing any further extension beyond that. My suggestion is simply to invite to the attention of the committee the fact that the bills as drawn do go beyond it.

Mr. WILLIS. I follow you very clearly, and I just wanted your idea as to what words would carry out the pre-Wunderlich situation. You say that you would have to delete in the GAO's proposal the "capricious" and "substantial evidence" approach?

Mr. MACOMBER. That is my view, Mr. Willis, yes, sir.

Mr. WILLIS. And just stick to "fraudulent" or "so grossly erroneous as necessarily to imply bad faith," period?

Mr. MACOMBER. Yes, sir.

My third point is that the substantial evidence clause appears to provide for an appellate type of review of the administrative decision. I do not think that is bad in itself. It seems to me that that provides rather unusual mechanics of review, in that as I understand it the Court of Claims or a District court hearing one of these cases would be, so far as the issues of fraud, error, arbitrary, or capricious are concerned, hearing them de novo. At the same time, it would appear, on the issue as to whether the decision was supported by substantial evidence, to be sitting in a sense as an appellate court, reviewing on an appeal basis the question whether the decision of the contracting officer and of the administrative board were supported by substantial evidence.

Mr. WILLIS. Your idea is the pre-Wunderlich review was strictly de novo?

Mr. MACOMBER. Yes, sir. General Services Administration feels that there should be some provision in the legislation, if not an explicit provision at least by appropriate wording with respect to the judicial review portion, that will insure an opportunity to protect the Government against excessive generosity, against decisions of the contracting officer adverse to the Government. I think cases can arise of that sort, although I concede that more frequently perhaps the contracting officer's decision runs against the contractors unfairly rather than against the Government.

I think there might be some doubt under the wording of H. R. 6946, as there is under the wording of the revised disputes clause that is now used in standard form 23, where specific reference is made to a finding by the court as to whether the General Accounting Office could seek a court review by a setoff or by applying to the Department of Justice for recovery in a case where they felt that the action of the contracting officer was grossly erroneous as against the Government. I think that the language suggested by the Comptroller General's revision gets away from that difficulty. Section 2 of all of the bills provides in effect that no contract can contain a provision making the decision of the contracting officer final on questions of law. Certainly no one can quarrel with that provision so far as general questions of law are concerned. It has, however, been the practice to insert in many construction contracts a provision making the decision of the contracting officer final with respect to questions of interpretation of specifications and drawings. I think that it can be argued—and in fact I am certain that it will be—that the Court of Claims has taken the position that questions of interpretation on specifications and drawings are questions of law rather than questions of fact, being

interpretation of written documents. In this connection, we merely suggest to the committee that it might be desirable to permit some degree of finality on that type of question of law, if it is possible to devise language that will separate that type from a more general question of law. I have no constructive suggestions to make as to what that language might be, other than saying specifically "questions of interpretation of specifications and drawings" or something of that sort.

Mr. WILLIS. You mean we should try to find language to permit the contracting officer to pass on interpretation of the documents?

Mr. MACOMBER. On technical questions involving interpretation of drawings and specifications. Not matters of general contract law, sir, but technical questions relating to the interpretation of technical documents, such as drawings and specifications.

Mr. WILLIS. The courts are not unanimous on that situation right now, are they?

Mr. MACOMBER. No, I do not believe they are, sir, but the Court of Claims has taken the position that that type of question is a question of law rather than a question of fact, in that in the Moorman case there was, in addition to the usual disputes clause relating to questions of fact, attached to the specifications a provision that the decision of the contracting officer on questions of interpretation of specifications and drawings should be final and conclusive, and it was that provision that was in issue in the Moorman decision. It was not an all-disputes clause in the sense that it made the decision of the contracting officer final on all questions of law.

Now my last point, sir, and I am not at all sure that it is a good point. It is merely a suggestion as to a possible solution for what seemed to us some of the difficulties inherent in the legislation. That would be statutory authorization for inclusion in construction and possibly supply contracts of a provision for the usual commercial type bilateral arbitration, rather than this unilateral arbitration, if you can call it arbitration, by a representative of one of the parties that you have under the present disputes clause.

Mr. WILLIS. If the bills would go in that direction, that would be an entirely different approach.

Mr. MACOMBER. That would be an entirely different approach, sir, and to be effective it would undoubtedly have to provide for arbitration of questions of mixed law and fact, as well as pure questions of fact. It may be questionable whether the Government should submit itself to bilateral arbitration on questions of law. We simply throw that out as suggestion for consideration.

That is all I have, Mr. Chairman. I will be very happy to answer any questions. I appreciate the opportunity of appearing.

Mr. WILLIS. I think it might be appropriate for the record at this time to note that in the case of *B. W. Construction Co.* v. *United States*, decided in 1944, it was held that the question of whether the contract had been breached was not within the disputes of fact clause. The construction of the provision in the specifications which seemed to be in conflict was held not to be within the adjudicative powers of the contracting officer in *Standard* v. *United States*, decided in 1947. Whether the contractor is entitled to recover for certain road maintenance, and also whether the contract called for payment of extra

concrete work at unit prices was held not to be within the disputes of fact clause.

I mention that because I am wondering, to carry out your thought, that if we try to insert some provision about giving the adjudicating officer some power over some facets of the questions of law we would not be going farther than the cases at this point go, and that we would be entering into a dangerous field.

Mr. MACOMBER. I think there is danger of that, Mr. Willis, yes, sir.

The CHAIRMAN. Thank you very much for your contribution.

Mr. FOLEY. The next witness is Mr. Winkelman.

STATEMENT OF DWIGHT W. WINKELMAN, PRESIDENT, D. W. WINKELMAN CO., SYRACUSE, N. Y., REPRESENTING THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

Mr. WINKLEMAN. Mr. Chairman and members of the committee, I am president of the D. W. Winkelman Co., Syracuse, N. Y. I am appearing as a representative of the Associated General Contractors of America. I am a member of the association's executive committee, and was president in 1948.

The association represents more than 6,500 of the Nation's leading general contractors. These construction firms, along with their other work, execute nearly all of the public works construction, both military and civil, performed for the Federal Government.

On behalf of all contractors signing construction contracts with the Federal Government, we recommend that the Congress enact legislation which will establish by law, beyond the possibility of doubt, the fundamental principle of American justice that the parties to a contract with the Federal Government have the right of judicial review of disputes which arise.

The right of appeal from the decision of contracting officers and department heads was so drastically limited by the decision of the United States Supreme Court in the Wunderlich case as to become meaningless.

The necessary clarification of the law can be accomplished by enactment of S. 24, by Senator Pat McCarran, which was passed by the Senate on June 8, 1953, or the identical bill, H. R. 1839, by Chairman Chauncey W. Reed of this committee.

In our opinion this legislation is essential, is in the public interest, and is needed as soon as possible to correct a current and serious inequity in our laws.

In order that I may be brief and conserve the committee's time, I would like to submit for the record the testimony which Mr. H. E. Foreman, managing director of the association, and John C. Hayes, counsel, gave in some detail on February 15, 1952, before the Senate Judiciary Committee when it held hearings on S. 2487 during the previous Congress.

At the last two annual conventions the association adopted resolutions recommending that Congress enact legislation such as is before you. I would like to submit the latest resolution for the record. The association's governing and advisory boards last September again supported the recommendation, and authorized the statement by President C. P. Street, which I also would like to submit.

Without going into detail, I would like to outline the principal reasons why we believe that such legislation is essential, is in the public interest, and should be passed.

The members of the committee are familiar with the decision by the United States Supreme Court on November 26, 1951, in the Wunderlich case, which led to the legislation under consideration. The court interpreted the finality clause, formerly article 15, of the standard Government construction contract form to mean that there could be judicial review of the decision of a department head involving a question of fact only in the event that fraud was alleged and proved. The Court added:

> By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest.

As proof that the Court of Claims is following the decision, the court has stated (*Palace Corp.* v. *United States*):

> The Supreme Court in construing the standard form of article 15 has now limited the scope of review of decisions of heads of departments to cases in which positive fraud is alleged and proved. No fraud is alleged in this case. It would be a sheer waste of time and energies of the court and the litigants to hear evidence beyond the limits of the blueprint clearly drawn by the highest judicial authority.

This strict limitation has, in effect, deprived contractors of the fundamental right of judicial review of disputes arising under Government contracts.

We believe that there is an immediate need in the public interest for such legislation, because the Wunderlich decision has had three principal harmful effects.

1. The decision has deprived contractors of a fundamental right of judicial review of disputes, and this has created an inequity in our laws governing contractual relationships.

2. The legislation has made the administrative agencies of Government, which are parties to the contracts, also the final judges of their impartial administration, thus giving them both administrative and judicial functions.

3. The decision has left contractors at the mercy of Government agencies. This adds another hazard to contracting for the Government. For each hazard the prudent contractor must add a contigency item to his office. This tends to increase the cost of construction.

We believe that these should be corrected as soon as possible.

We believe that a clear, definite and permanent Federal policy on the right of judicial review of disputes arising under Government contracts can be established most effectively by legislative action. We are doubtful if it can come about in any other manner.

For more than a quarter of a century the AGC, the professional societies and other associations in the industry have accepted invitations to consult with the various Government departments which have had the authority to prescribe contract forms. So far no standard construction contract form with a disputes clause which the industry considers equitable has been adopted.

On December 1, 1953, the use of a revised standard Government construction contract form and related documents was made mandatory by Government contracting agencies by action of the General Services Administration. A revised disputes clause, now article 6,

provides that decisions of department heads shall be final and conclusive "unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith." The Supreme Court equated these phrases to fraud, so the new disputes clause gives no relief.

The prescribed use of this standard contract form by the General Services Administration emphasizes that neither the Government agencies nor the contractors are free parties to determine the wording of the contract which they sign.

We are grateful to GSA Administrative Mansure for postponing effective date of the new standard contract from July 19 to December 1, 1953, so that our association and others could have the opportunity of presenting our views. So far Government agencies have not agreed on an equitable disputes clause.

Even though a satisfactory contract form might eventually be determined by administrative action, we believe that the Congress should establish Federal policy on such a fundamental principle of American justice.

The Supreme Court in its majority opinion pointed out that this was a matter for Congress by stating:

> The limitation upon this arbitral process is fraud, placed there by this court. If the standard of fraud that we adhere to is too limited, that is a matter for Congress.

Prior to the Supreme Court decision, contractors did have the right to go to the Court of Claims with their disputes. The need for legislation to reclarify that fundamental right of judicial review is pointed up by the dissenting opinions.

Justice Douglas, with Justice Reed concurring, wrote in part:

> We should allow the Court of Claims, the agency close to these disputes, to reverse an official whose conduct is plainly out of bounds whether he is fraudulent, perverse, captious, incompetent, or just palpably wrong. The rule we announce makes Government oppressive. The rule of the Court of Claims gives a citizen justice even against his government.

Justice Jackson wrote in part:

> Granted that these contracts are legal, it should not follow that one who makes a public contract puts himself wholly in the power of contracting officers and department heads . . . I still believe one should be allowed to have a judicial hearing before his business can be destroyed by administrative action.

In conclusion, we recommend that Congress, as promptly as possible, enact the legislation contained in S. 24 and H. R. 1839, which will clearly establish by law the fundamental principle of American justice that the parties to a contract with the Federal Government have the right of judicial review of disputes which may arise. Our reasons are:

1. Neither the Government contracting agency nor the contractor has the authority to determine the wording of the standard Government construction contract form.

2. The Supreme Court, in the Wunderlich decision, limited the disputes clause in the standard contract to apply only to cases in which fraud is alleged and proved, and limited fraud to mean "conscious wrongdoing, an intention to cheat or be dishonest."

3. Even if a satisfactory disputes clause is adopted by administrative action, the policy does not necessarily become permanent.

4. The legislation is in the public interest because it will correct an inequity and restore justice to contractual relationships, and will remove a hazard which tends to increase the cost of construction.

5. It is proper that Congress establish a clear, definite, and permanent policy on such a fundamental principle of American justice.

6. Enactment of the legislation will not increase the burdens on the courts.

Mr. Chairman, that concludes my formal testimony. I would be glad to answer questions.

The CHAIRMAN. Do you wish to include in your statement these letters?

Mr. WINKELMAN. To accompany my statement, yes, sir. I believe it is not necessary for me to go through them. It would not be conserving your time.

The CHAIRMAN. If there is no objection.

(The letters referred to are as follows:)

GENERAL SERVICES ADMINISTRATION,
Washington 25, D. C., June 18, 1953.

Mr. H. E. FOREMAN,
Managing Director, The Associated General Contractors of America, Inc., Munsey Building, Washington 4, D. C.

DEAR MR. FOREMAN: This replies to your letter of May 26, 1953, concerning the standard construction contract form and related forms, which were prescribed by the Administration for mandatory governmentwide use effective June 19, 1953. You feel, apparently, that industry was not consulted sufficiently in the development of the forms.

As you know, the Government drafting group had several meetings with the Public Works Construction Advisory Committee of which you were a member. After the abolition of the committee, drafts of the forms were submitted, on October 29, 1951, to Mr. Edmund R. Purvis, executive director of the American Institute of Architects, former committee chairman. On November 5, 1951, Mr. Purvis advised that industry comments would be forthcoming by November 30. As no comments were received it was assumed that the forms were satisfactory.

I definitely want to receive and give full consideration to the views of industry on this or any other standard contract form before it is issued by the Government.

In view of the procedural requirements of the Department of Defense, we recently extended, until December 1, 1953, for the Department, the effective date for mandatory use of the form. To avoid having different rules for the military and civilian agencies, I have decided to make the June 19, 1953, date one for optional use only, and to extend until December 1, 1953, the date for mandatory use.

This period of optional use will afford both Government and industry an opportunity to discover from actual practice whether there are any "bugs" in the form. It will also give you and other industry spokesmen the time to present your views to this Administration. In this connection I suggest that you get in touch with our General Counsel, Mr. Maxwell H. Elliott, or Mr. John W. Fretz, Jr., of his staff. Either of them will be happy to arrange for an appropriate conference.

On the matter of the disputes clause, I think that you will find, upon further consideration, that such clause substantially reflects the intent as well as the letter of the dissenting opinions in the Wunderlich case. This is not intended to preclude you from further discussion of this question with Messrs. Elliott and Fretz if you so desire.

I am sending copies of this letter to Mr. Purvis and the Secretary of Defense.

Sincerely yours,

EDMUND F. MANSURE, *Administrator.*

MAY 26, 1953.

MR. EDMUND F. MANSURE,
Administrator, General Services Administration,
Washington 25, D. C.

DEAR MR. MANSURE: This association, representing 6,300 of the Nation's general construction contractors, has for many years been keenly aware of the hazards its members were assuming in doing business with the Government under the provisions of the Standard Government Construction Contract Form 23. A continuing effort, beginning in 1929, has been made to secure, by administrative action, a revised form of contract more equitable to contractors, and, more specifically, to rectify conditions created by certain court decisions interpreting specific contracts and specifications. Notable among these were situations in which the contractor was denied compensation for damages as the result of delay by actions of the Government (*U. S.* v. *Foley*, 1946, 329 U. S. 64; *U. S.* v. *Rice*, 1942, 317 U. S. 61), and situations where appeal from the decision of the department head was denied the contractor unless fraud on the part of the department head was alleged and proved (*U. S.* v. *Wunderlich*, 1951, 342 U. S. 98).

In delivering its opinion in the Wunderlich case, the Supreme Court stated:

"By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest."

The serious and far-reaching implications of the decision were summed up by Mr. Justice Douglas, in the strong dissenting opinion, wherein he stated:

"But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse, or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected."

Mr. Justice Jackson, in his dissent, stated in part:

"Granted that these contracts are legal, it should not follow that one who takes a public contract puts himself wholly in the power of contracting officers and department heads."

In September 1949, the writer, representing the Associated General Contractors of America, together with representatives of the America Institute of Architects, American Society of Civil Engineers and the American Society of Mechanical Engineers, were named as a subcommittee of the Construction Industry Advisory Council to what was then the Federal Works Agency, now consolidated into and made part of the General Services Administration, and had submitted to it a tentative revision of form 23, with the request that the subcommittee criticize the tentative draft and submit recommendations and suggestions. The writer served as chairman of that subcommittee. Careful analysis of the tentative draft was made and a comparison was made of the form 23 then in force. Numerous meetings were held by the subcommittee and at least three meetings were held with representatives of the Government in the offices of the Federal Works Agency.

In December 1951, after a Government reorganization had taken place, the Construction Industry Advisory Council as a whole was notified of its abolishment, with no comment either in connection with this contract form or the many other matters that were discussed with it during its existence.

On March 19, 1953, your office issued General Services Administration General Regulation 13, of which the 1953 revision of form 23 is a part, provisions of which become effective June 19, 1953. A careful study has been made of this new form, comparing it with the tentative draft submitted in 1949, with the form presently in effect, and with the recommendations made by my advisory committee. The summation can be very brief: A few changes of a clarifying nature have been made, and a very few of the suggestions of the subcommittee appear to have had some considerations in the revision. For the most part, however, the contract is substantially the same as the 1942 version, and is drafted completely from the standpoint of the Government.

While our objections are not confined to the disputes clause (clause 6), it is a representative example of the contract's unfairness. Under the provisions of this clause the contractor, in order to have appeal from the decision of the department head, must prove him to be fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith. For all practical purposes

this means that the decision of the administrative officials nearly always will be final because of the extreme difficulty of proving fraud. Many other provisions of the contract are almost equally unfair.

The solicited criticism and recommendations of four of the largest and most respected organizations in the construction industry have been almost completely disregarded in favor of arbitrary provisions giving Government agents unlimited power over those who enter into contracts with the Government. The question can well be asked: "If representatives of the largest segments of the industry cannot in any important degree alter the terms of Government contracts, even when invited to do so, how can an individual contractor or bidder have any prospect of influencing the terms of Government construction work whereon he has pledged his equipment and capital as security that the contract will be carried out in accordance with its terms?"

In the Wunderlich case, the Supreme Court made the following statement:

"Respondents were not compelled or coerced into making the contract. It was a voluntary undertaking on their part. As competent parties they have contracted for the settlement of disputes in an arbitral manner."

This indicates that the parties, in contracting with the Government, are capable of adjusting the contract terms at will. Nothing can be farther from the truth. Neither party is at complete liberty to make such adjustments. If we visualize the Government in an individual case to be an individual contracting officer, he is under instructions to follow standards developed by another tribunal, representing the Government, that has prescribed those standards.

It is our sincere hope that you will recognize the unjustness of this document and take corrective measures before its effective date. We will, as always, be pleased to cooperate and assist in any way possible.

This letter has also been sent to the Secretary of Defense.

Sincerely yours,

H. E. FOREMAN,
Managing Director.

STATEMENT BY DWIGHT W. WINKELMAN, PRESIDENT, D. W. WINKELMAN CO., SYRACUSE, N. Y., REPRESENTING THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

My name is Dwight W. Winkelman. I am president of the D. W. Winkelman Co., Syracuse, N. Y.

I am appearing as a representative of the Associated General Contractors of America. I am a member of the association's executive committee, and was president in 1948.

The association represents more than 6,500 of the Nation's leading general contractors. These construction firms, along with their other work, execute nearly all of the public works construction, both military and civil, performed for the Federal Government.

On behalf of all contractors signing construction contracts with the Federal Government, we recommend that the Congress enact legislation which will establish by law, beyond the possibility of doubt, the fundamental principle of American justice that the parties to a contract with the Federal Government have the right of judicial review of disputes which arise.

The right of appeal from the decision of contracting officers and department heads was so drastically limited by the decision of the United States Supreme Court in the Wunderlich case as to become meaningless.

The necessary clarification of the law can be accomplished by enactment of S. 24, by Senator Pat McCarran, which was passed by the Senate on June 8, 1953, or the identical bill, H. R. 1839, by Chairman Chauncey W. Reed of this committee.

In our opinion this legislation is essential, is in the public interest, and is needed as soon as possible to correct a current and serious inequity in our laws.

In order that I may be brief and conserve the committee's time, I would like to submit for the record the testimony which Mr. H. E. Foreman, managing director of the association, and John C. Hayes, counsel, gave in some detail on February 15, 1952, before the Senate Judiciary Committee when it held hearings on S. 2487 during the previous Congress.

At the last two annual conventions the association adopted resolutions recommending that Congress enact legislation such as is before you. I would like to

submit the latest resolution for the record. The association's governing and advisory boards last September again supported the recommendation, and authorized the statement by President C. P. Street, which I also would like to submit.

Without going into detail, I would like to outline the principal reasons why we believe that such legislation is essential, is in the public interest, and should be passed.

JUDICIAL REVIEW NOW LIMITED TO FRAUD

Members of the committee are familiar with the decision by the United States Supreme Court on November 26, 1951, in the Wunderlich case, which led to the legislation under consideration. The Court interpreted the finality clause, formerly article 15, of the standard Government construction contract form to mean that there could be judicial review of the decision of a department head involving a question of fact only in the event that fraud was alleged and proved. The Court added: "By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest."

As proof that the Court of Claims is following the decision, the Court has stated (*Palace Corp. v. United States*, 110 F. Supp. 476, 478 (Ct. Cl. 1953)):

"The Supreme Court in construing the standard form of article 15 has now limited the scope of review of decisions of heads of departments to cases in which positive fraud is alleged and proved. No fraud is alleged in this case. It would be a sheer waste of time and energies of the court and the litigants to hear evidence beyond the limits of the blueprint clearly drawn by the highest judicial authority."

This strict limitation has, in effect, deprived contractors of the fundamental right of judicial review of disputes arising under Government contracts.

CHANGE NEEDED IN PUBLIC INTEREST

We believe that there is an immediate need in the public interest for such legislation, because the Wunderlich decision has had three principal harmful effects:

1. The decision has deprived contractors of a fundamental right of judicial review of disputes, and this has created an inequity in our laws governing contractual relationships.

2. The legislation has made the administrative agencies of Government, which are parties to the contracts, also the final judges of their impartial administration, thus giving them both administrative and judicial functions.

3. The decision has left contractors at the mercy of Government agencies. This adds another hazard to contracting for the Government. For each hazard the prudent contractor must add a contingency item to his office. This tends to increase the cost of construction.

We believe that these should be corrected as soon as possible.

LEGISLATION IS REQUIRED

We believe that a clear, definite and permanent Federal policy on the right of judicial review of disputes arising under Government contracts can be established most effectively by legislative action. We are doubtful if it can come about in any other manner.

For more than a quarter of a century, the AGC, the professional societies and other associations in the industry, have accepted invitations to consult with the various Government departments which have had the authority to prescribe contract forms. So far no standard construction contract form with a disputes clause which the industry considers equitable has been adopted.

On December 1, 1953, the use of a revised standard Government construction contract form and related documents was made mandatory by Government contracting agencies by action of the General Services Administration. A revised disputes clause, now article 6, provides that decisions of department heads shall be final and conclusive "unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith." The Supreme Court equated these phrases to fraud, so the new disputes clause gives no relief.

The prescribed use of this standard contract form by the General Services Administration emphasizes that neither the Government agencies nor the contractors are free parties to determine the wording of the contract which they sign.

We are grateful to GSA Administrator Mansure for postponing effective date

of the new standard contract from June 19 to December 1, 1953, so that our association and others could have the opportunity of presenting our views. So far Government agencies have not agreed on an equitable disputes clause.

Even though a satisfactory contract form might eventually be determined by administrative action, we believe that the Congress should establish Federal policy on such a fundamental principle of American justice.

SUBJECT FOR CONGRESS

The Supreme Court in its majority opinion pointed out that this was a matter for Congress by stating: "The limitation upon this arbitral process is fraud, placed there by this Court. If the standard of fraud that we adhere to is too limited, that is a matter for Congress."

FUNDAMENTAL PRINCIPLES

Prior to the Supreme Court decision, contractors did have the right to go to the Court of Claims with their disputes. The need for legislation to reclarify that fundamental right of judicial review is pointed up by the dissenting opinions.

Justice Douglas, with Justice Reed concurring, wrote in part:

"We should allow the Court of Claims, the agency close to these disputes, to reverse an official whose conduct is plainly out of bounds whether he is fraudulent, perverse, captious, incompetent, or just palpably wrong. The rule we announce makes Government oppressive. The rule of the Court of Claims gives a citizen justice even against his Government."

Justice Jackson wrote in part:

"Granted that these contracts are legal, it should not follow that one who makes a public contract puts himself wholly in the power of contracting officers and department heads * * * I still believe one should be allowed to have a judicial hearing before his business can be destroyed by administrative action."

CONCLUSION

On conclusion, we recommend that Congress, as promptly as possible, enact the legislation contained in S. 24 and H. R. 1839, which will clearly establish by law the fundamental principle of American justice that the parties to a contract with the Federal Government have the right of judicial review of disputes which may arise. Our reasons are:

1. Neither the Government contracting agency nor the contractor has the authority to determine the wording of the standard Government construction contract form.
2. The Supreme Court, in the Wunderlich decision, limited the disputes clause in the standard contract to apply only to cases in which fraud is alleged and proved, and limited fraud to mean "conscious wrongdoing, an intention to cheat or be dishonest."
3. Even if a satisfactory disputes clause is adopted by administrative action, the policy does not necessarily become permanent.
4. The legislation is in the public interest because it will correct an inequity and restore justice to contractual relationships, and will remove a hazard which tends to increase the cost of construction.
5. It is proper that Congress establish a clear, definite and permanent policy on such a fundamental principle of American justice.
6. Enactment of the legislation will not increase the burdens on the courts.

STATEMENT BY H. E. FOREMAN, MANAGING DIRECTOR, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

STANDARD GOVERNMENT CONTRACT FORM 23—DISPUTES CLAUSE (ARTICLE 15)

My name is Herbert E. Foreman. I appear before you as the managing director of the Associated General Contractors of America, Inc. We appear primarily before your committee to seek legislative relief from the interpretations of the disputes clause found in the standard Government contract form by the Supreme Court of the United States in the Wunderlich case decided November 26, 1951. This decision has had a disturbing effect throughout the entire membership of the vast construction industry.

In appearing here today as the representative of an association whose membership is composed of over 6,000 general contractors, we are seeking to maintain and strengthen the high standards of skill, integrity and responsibility to which our association is dedicated.

General situation

In the Wunderlich case, the Supreme Court makes the following statement: "Respondents were not compelled or coerced into making the contract. It was a voluntary undertaking on their part. As competent parties they have contracted for the settlement of disputes in an arbitral manner." This statement brings into focus a point on which we wish to dwell at considerable length. It indicates that the parties, in contracting with the Government, are dealing at arm's length and are capable of adjusting the contract terms at will. Nothing can be farther from the truth. Neither party is at complete liberty to make such adjustments. That is, if we visualize the Government in an individual case to be an individual contracting officer, he is under instructions to follow standards developed by another tribunal representing the Government, that has prescribed these standards. This tribunal has shifted in character and personnel many times during the last 30 years, originating by Executive order as the Interdepartmental Board of Contracts and Adjustments issued in 1921 under the Treasury Department, with representatives duly selected by all the departments, and promulgated its first drafts of standard conditions for the several types of contracts in 1926. The departments and agencies and their respective contracting officers were under instruction not to deviate therefrom, except after having made specific request upon the Board for permission to do so and having the same granted.

Various reorganizations of the Government have since taken place and the Board, or at least its functions, appear to have been transferred to the Bureau of Federal Supply, of the Treasury Department, and, since that time, at least in part to the General Services Administration. Also, in the interim, two separate Procurement Acts have been passed, one being the Military Procurement Act of 1947, and the other the Federal Procurement Act of 1948. In each case it prescribes the duty of promulgating the standards of procurement. This would seem to fix the respective authority but the procedures for obtaining consideration for changes in established contract forms, even though this witness has in the past several years been officially requested to give advice, have not been satisfactory. At this time, Standard Construction Form of Contract No. 23 is generally in use and the departments are loath to make any substantial changes. Such being the case, either from the Government's side, or for the contractor individually, or even collectively, to work out satisfactory terms does not exist.

The Supreme Court is correct that a contractor is not coerced to accept the contract with the Government, except in those cases during the war where confiscation was sometimes suggested and was authorized should the war effort require. But in fulfilling the peacetime requirements for the Government, this industry regularly finds a substantial portion of its market amounting to several billions of dollars annually coming from Federal Government sources. The industry is certain that the construction needs of the Government are best filled as a result of private contracts arrived at after advertised competitive bidding and this association has encouraged its members to bid upon and accept contracts in spite of unfair conditions of the contract. Contractors intend to give no agency of the Government so minded any excuse for endeavoring to undertake to do the work with its own forces. In the meantime, contractors through their association have never rested in its endeavor to bring about rephrasing of the contract so as to establish the fundamental rights for which America stands. The following recites a record of some of those efforts.

Disputes clause (art. 15)

Our association for many years has been keenly aware of the hazard its members were assuming in doing business with the Government, especially in view of the contract provisions contained in article 15 of the standard Government contract form. This article provides as follows:

"Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

A continuing effort has been made to secnre, by administrative action, a revision of the dispntes clause to permit judiciary review of questions arising under a contract. As early as 1924 the Interdepartmental Board of Contracts and Adjustments, created for the purpose of drafting a standard form of building and constrnction contract, tentatively adopted a form, and in article 21 included the right of the contracting officer to make final and conclusive decisions with the right of appeal to tlie bead of the department or independent establishment. However, provision was also made for the review of such decisions. This was stated in the following language:

"His decision, when rendered, shall be final and conclusive and carried out by tbe parties as within the contemplation of tbis contract, unless within 30 days after such decision the contractor shall bring suit or give written notice to the head of the department or independent establishment of his intention to bring suit in court to determine his legal rights involved in such decision."

The later drafts of the proposed standard form of Government contract retained the right of the contracting officer to make final and conclusive decisions but eliminated the review clause.

In 1932, it was my privilege to represent our association before the Board and take specific exception to the language in the disputes clause making the decision of the contracting officer and, upon appeal, the head of the department final and conclusive on disputed questions of fact. This is evidenced by the following excerpt appearing in the minutes of the Interdepartmental Board of Contracts and Adjustments dated November 18, 1932:

"At the time of the hearings on the proposed new public contract law it was pointed out by the Associated General Contractors and others that this language making the decision of the executive department final and conclusive on disputed questions of fact was unfair to the contractor who, by reason thereof, was unable to bave reviewed unfair decisions made by the contracting officer and generally approved by tlie head of the department."

From the early thirties until the close of the Second World War, various forms of emergency contracts were in use, each designed to meet the circumstances of the emergency. However, at no time was the circumstauce remedied so as to give the contractor an opportunity of review from tlie decision of the head of the department concerned. There was no disposition to give consideration to any amendments to a standard form of contract, inasmuch as the emergency forms had quite largely superseded the same during the period.

By 1947 return had been made to the old standard forms in most instances and onr association again actively pressed for revision of the form. The records will show tbat in 1947 and 1948 a number of presentations and personal appearances were made through the Office of the Director of Federal Supply of the Treasury Department. In 1949 a revision of this form was developed by a committee composed of governmental officials set up to advise the Director of Federal Supply. At the same time, there existed in the office of the Federal Works Agency, of which General Philip Fleming was Administrator, a Construction Industry Advisory Committee appointed from organizations representing various groups interested in public works construction and it was my privilege to represent the Associated General Contractors on this Committee. In September 1949 this Committee was asked to study and comment upon this suggested revised standard construction contract. The Advisory Committee, in turn, selected a subcommittee from within its membership composed of one representative each from the American Institute of Architects, American Society of Civil Engineers, American Society of Mechanical Engineers, and the Associated General Contractors of America. This witness, as a representative of tlie Associated General Contractors, was named as chairman of this subcommittee, and Mr. John C. Hayes assisted the Committee as counsel.

Many meetings were held with the Government representatives serving on this committee. The industry's committee recommended that the disputes clause be revised as follows:

"*Disputes.*—All disputes, except as otherwise specifically provided in this contract, arising under this contract shall be decided by the contracting officer who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the contractor. Within 30 days thereafter, the contractor may appeal in writing to the head of the department concerned, and the decision in writing of such head or his duly authorized representative shall be final and conclusive upon the parties hereto, as to tbe progress and execution of the work, *Provided that*

nothing in this contract or associated documents shall void the right of either party to this contract carrying the dispute before a court of competent jurisdiction." (Italics supplied.)

At no time has it been possible to secure any substantial revision of the disputes clause conferring authority on the contracting officer, subject to appeal to the head department, to make final and conclusive decisions on questions of fact. In the many conferences held with administrative groups representing various departments, bureaus, and agencies there have always been one or two of the representatives who voiced the opinion that no revision should be made of the disputes clause. As a result, no change has been made, notwithstanding the ever narrowing definition of the disputes clause by the courts.

The latest draft of the disputes clause that we have seen is that contained in a draft, dated October 18, 1951, going the rounds of the various departments and, while the Construction Industry Advisory Committee was terminated by the present Administrator of the General Services Administration in December 1950, the above-described organizations and their representatives have held themselves available to be of service on an informal basis. By reason of this fact, we have been privileged to see this latest draft and the disputes section contained therein reads as follows:

"*Disputes.*—Except as otherwise specifically provided in this section, all disputes concerning questions of fact, arising under this contract shall be decided by the contracting officer who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the contractor. Within 30 days from the date of the receipt thereof, the contractor may appeal in writing to the head of the department concerned, and the decision in writing of such head or his duly authorized representative shall be final and conclusive upon the parties hereto. In the meantime the contractor shall diligently proceed with the work as directed."

This demonstrates quite conclusively that legislative relief offers the only possibility of remedy. That there may be no question that the various contracting officers are barred from negotiating the contract terms at will is demonstrated by a letter attached hereto from the Director of Federal Supply in 1947 relating to the 1942 edition of form 23 stating that the contract form was mandatory, and the latest draft of a similar instruction contains similar language.

Effect of the Wunderlich Decision

The holding of the Supreme Court in the Wunderlich case has confirmed our worst fears as to the effect of the finality clause in the disputes section of the contract. In past years, when the association has made arguments for a right of appeal in this article, we have frequently been met with the statement from Government officials that our fears were groundless; that in spite of anything that could be written into the contract of this nature, the Court would nonetheless take cognizance of an injustice and afford the needed judicial remedy.

This latest decision, in our estimation, completely demolished this position. We, therefore, present to the committee our plea that legislation be enacted to establish in unmistakable terms this right of appeal. We believe that it is only fair that existing contracts and those arising out of contract which were in process at the time of the decision also be afforded such remedy or relief.

Position of the Associated General Contractors of America, Inc.

At the beginning of the present session of this Congress, our association addressed the chairmen of the Judiciary Committees of the Congress requesting legislation to embody the following principles:

1. That any Government contract, regardless of the language of the contract itself, shall be subject to appeal to appropriate courts from rulings of the contracting officer or the head of the department both as to matters of fact and law.
2. That all existing contracts be modified accordingly.
3. That any matters growing out of Government contracts, which were legally in process at the time of the decision, have their status renewed as of the date of such decision, and that the contract be construed in accordance with the principles set forth in 1 and 2.

On behalf of general contractors we earnestly request favorable consideration, and ask early action so that the remedy may be accomplished during this session of Congress.

Mr. John C. Hayes, counsel for the association, will follow with more details on the legal aspects of the questions involved.

TREASURY DEPARTMENT,
BUREAU OF FEDERAL SUPPLY,
Washington, D. C., October 1, 1947.

Office of the Director.
Circular Letter B–69.
To: Heads of departments and establishments.
From: Clifton E. Mark, Director, Bureau of Federal Supply.
Subject: Standard contract forms.

Use by executive agencies of certain standardized forms of invitations for bids, instructions to bidders, contracts, bonds and purchase order has been prescribed by regulations approved by the Acting Secretary of the Treasury May 4, 1943, May 18, 1943, July 7, 1944, and August 25, 1944 (Code of Federal Regulations, title 41, pt. 11), as follows:

"SEC. 11.4 *Forms to be used.*—Except as otherwise authorized by law, by these regulations, by the Director, Bureau of Federal Supply, under section 11.3, or by the instructions or directions contained in the forms themselves, the following standard forms shall be used without deviation by all departments and establishments in the executive branch of the Government, for or in connection with every formal contract of the kinds specified that may be entered into by them.

"(a) *Leases.* * * *

"(b) *Construction or supply contracts.* * * *

"(c) *Construction contracts.*

"1. United States Standard Form No. 23–Rev. approved by the Secretary of the Treasury, revised April 3, 1942, for fixed-price contracts for the construction or repair of public buildings or works."

34TH ANNUAL CONVENTION,
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Miami, Fla., March 23–26, 1953.

RESOLUTION NO. 7—RIGHT OF JUDICIAL REVIEW

The Associated General Contractors of America, at its 34th annual convention in Miami, Fla., March 23-26, 1953, reaffirms the resolution adopted at its previous convention as follows:

The majority decision of the Supreme Court of the United States in the Wunderlich case, decided November 26, 1951, interpreting the disputes clause (art. 15) of the standard form of Government contract to mean that the determination of a department head is final, and that there can be no recourse to the courts in disputes involving questions of fact unless fraud on the part of the Government is alleged and proved, makes legislation mandatory by the Congress of the United States to prevent the destruction of the competitive contract method now prevailing throughout the construction indusry.

The dissenting opinions recognize and warn that the majority decision has wide application as well as a devastating effect, granting the contracting officer the power of life and death over a private business, which permits him to act without fear of further administrative review by an independent Government agency not involved in the dispute or judicial review by the courts.

The Associated General Contractors of America for the past several years has sought administrative action on the revision of the disputes clause (art. 15) to permit judicial review of all questions arising under a contract, all to no avail.

It is the sense of this convention that any decision by a contracting officer or head of a department should be subject to judicial review in order to guarantee that such decision is reasonable, made with due regard to the rights of both the contracting parties, and supported by the evidence upon which such decision was based.

Therefore, the Associated General Contractors of America urges the Congress of the United States to enact legislation conferring on the courts jurisdiction to review any decision by a contracting officer or head of a department that is unreasonable or unjust, or not supported by substantial evidence; and further, that any provision in any contract with the United States abridging the rights of the parties thereto to court review be declared null and void and that contractors' suits now pending in the courts which have not been finally adjudicated be safeguarded in this legislation.

(Submitted for the record by Mr. Winkelman).

STATEMENT BY C. P. STREET, McDEVITT & STREET CO., CHARLOTTE, N. C., PRESIDENT, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

My name is C. P. Street, of McDevitt & Street Co., Charlotte, N. C., and president of the Associated General Contractors of America. The association represents more than 6,300 of the Nation's leading general contractors. These construction companies, along with their other work, execute nearly all of the public works construction, both military and civil, performed for the Federal Government.

Mr. John C. Hayes, the association's counsel, and I are here representing AGC members to recommend that the Congress enact legislation which will establish by law the fundamental principle of justice that the parties to a contract with the Federal Government have the right of judicial review of disputes which might arise.

Such legislation is contained in H. R. 1839, by Chairman Reed of this committee, and in S. 24 which was passed by the Senate on June 8.

In the interests of conserving the committee's time we will be brief. First, I would like to file with the committee the testimony which Mr. H. E. Foreman, managing director of the association, gave on February 15, 1952, before the Senate Judiciary Committee when it held hearings on S. 2487 during the previous session of Congress.

Without going into detail, I would like now to outline the principal reasons why we believe that such legislation is essential, is in the public interest, and should be passed.

REVIEW LIMITED TO FRAUD

Members of the committee are familiar with the decision by the United States Supreme Court on November 26, 1951, in the Wunderlich case, which led to the legislation under consideration. The court interpreted the finality clause, article 15, of the standard Government construction contract form that there could be judicial review of the decision of a department head involving a question of fact only in the event that fraud was alleged and proved. The Court added: "By fraud we mean conscious wrongdoing, an intent to cheat or be dishonest."

It is doubtful that a responsible official of the Government would be guilty of "conscious wrongdoing, an intention to cheat or be dishonest." It would also be virtually impossible to prove even if this were so. Therefore we believe that limiting the judicial review of decisions by department heads to cases in which fraud can be alleged and proved is, in effect, depriving contractors of such a right.

EFFECT ON THE CONTRACTOR

I would like to point out briefly the effect of this decision on the contractor. The business of general contracting has inevitable hazards. For each hazard the prudent general contractor must add a contingency item to his bid. If the contractor is denied the right of judicial review of the decisions of contracting officers and department heads which he believes are wrong and unfair, another hazard has been created for his business.

We believe that it is in the public interest to enact this legislation which will remove that hazard in that it will enable contractors to omit such a contingency item from his bid. This will tend to decrease the cost of Federal construction.

PROPER SUBJECT FOR CONGRESS

The Supreme Court in its majority opinion pointed out that it was proper for the Congress to act in this matter. Justice Minton wrote in part:

"The limitation upon this arbitral process is fraud, placed there by this Court. If the standard of fraud that we adhere to is too limited, that is a matter for Congress."

The association, at its last two annual conventions, has adopted resolutions recommending that Congress enact legislation such as is before you. At this point I would like to submit for the record a copy of the latest resolution.

NOT FREE PARTIES

Emphasis should be given to the fact that neither the Government contracting agencies nor general contractors are free parties to determine the wording of the standard Government construction contract form.

Here I would like to submit for the record a copy of General Regulation No. 13 of the General Services Administration dated March 19, 1953. Had the time not been changed by Administrator Mansure, this would have made it mandatory for all Federal agencies to use revised standard construction contract forms starting June 19.

A new disputes clause, now article 6, is in this revised form No. 23a. This provides that decisions of department heads shall be final and conclusive "unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith." In our opinion this is no better than the previous disputes or finality clause.

At this point, I would like to submit an exchange of correspondence between Mr. Foreman and Administrator Mansure. Following a thorough study of the revised contract form the association protested its unfairness to Mr. Mansure. He replied that mandatory use of the form has been postponed until December 1 so that there will be opportunity for further study and presentation of the views of the industry.

We are grateful to Mr. Mansure for providing this association, and others in the industry, an opportunity to present our views and we have accepted his invitation to meet with members of his staff.

But I would like to point out that for more than 25 years representatives of AGC, the professional societies and other associations in the industry, have accepted the invitations of the various government departments which have had the authority to prescribe contract forms, and that there has not yet been adopted a fair and equitable standard construction contract form and satisfactory disputes clause.

This is another reason why we believe that the Congress should state by legislation the principles which should prevail on judicial review of disputes.

FUNDAMENTAL PRINCIPLE

We believe that a fundamental principle of American justice is involved and that legislation should be enacted which will make it clear that the parties to a Government contract have the right of judicial review of disputes which might arise.

Dissenting opinions of Supreme Court members encourage corrective action. Justice Douglas, with Justice Reed concurring, wrote in part:

"But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. * * * He has the power of life and death over a private business even though his decision is grossly erroneous. * * *

"We should allow the Court of Claims, the agency close to these disputes, to reverse an official whose conduct is plainly out of bounds whether he is fraudulent, perverse, captious, incompetent, or just palpably wrong. The rule we announce makes the Government oppressive. The rule of the Court of Claims gives a citizen justice even against his Government."

Justice Jackson, in his dissent, stated in part:

"Granted that these contracts are legal, it should not follow that one who takes a public contract puts himself wholly in the power of contracting officers and department heads. * * * I still believe one should be allowed to have a judicial hearing before his business can be destroyed by administrative action. * * *"

We believe that it is proper for Congress to write into the law the basic principle that parties to a Government contract do have the right of judicial review, rather than to leave such a principle to the discretion of a Government official.

CONCLUSION

In conclusion I would like to emphasize the following:

1. Neither the Government contracting agency nor the general contractor has authority to determine the wording of the Government standard construction contract form.

2. The Supreme Court, by its decision in the Wunderlich case, has limited judicial review of disputes arising under Government contracts to cases where fraud is alleged and proved, and has limited fraud to mean "conscious wrongdoing, an intention to cheat or be dishonest."

3. The AGC, the professional societies, and other associations in the construction industry have by request consulted with Government agencies for more than a quarter of a century, but there has not yet been developed by admin-

istrative action a fair and equitable standard Government construction contract form or a satisfactory disputes or finality clause.

4. We, therefore, recommend that the Congress establish the principle by legislation that the parties to a Government contract have the right of judicial review of disputes involving questions of fact as well as law, and thereby give a permanent remedy to the effects of the Supreme Court decision.

5. We do not believe that enactment of the legislation will increase the burden for the courts.

6. The legislation is in the public interest because it will have a tendency to lower construction costs.

Mr. WILLIS. I would like to ask just one question, Mr. Chairman. On page 6 of your statement you say: "Even if a satisfactory disputes clause is adopted by administrative action, the policy does not necessarily become permanent." Let me show you how right you are. Mr. Macomber, who just testified in connection with the General Services Administration, on my questioning said that in his opinion to conform with the pre-Wunderlich situation—I made a note of it—the words in the GAO's proposal, "arbitrary" and "capricious," should be deleted, and that there should be left only the thought "Unless determined by a court of competent jurisdiction to have been fraudulent or so grossly erroneous as necessarily to imply bad faith," period.

Now, on page 4 of your statement you say that just last year General Services Administration proposed a revision, which had become article 6, and you say that that article as then proposed just last year reads thusly: "Unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith." Just last year they were willing to have the words "capricious" and "arbitrary," and I am not being critical at all, but apparently in today's testimony the General Counsel of General Services Administration says that those words "capricious" and "arbitrary" would go too far and that he would want to delete them. Unless the gentleman can explain it who just testified, that was his testimony just a few minutes ago.

Mr. MACOMBER. My thought was that I was directing my remark to the point that, as we saw it, the legislation and as well the clause in article 6 of the new standard form does do more than restore the pre-Wunderlich rule.

Mr. WILLIS. I follow you. In other words, what you meant to convey is that the pre-Wunderlich situation would require the deletion of those two words?

Mr. MACOMBER. Yes, sir.

Mr. WINKELMAN. Mr. Chairman, I would like to comment that to my personal knowledge our association and other professional groups have made a serious effort to cooperate with the various departments of Government in drawing up a standard form of contract, but it is a most difficult thing to do. There are many departments of Government. There are many separate heads, and we have so far been unsuccessful. I think it is just the result of human nature being as we are. We have so far never been able to draw up a standard form of contract.

And then the point again I would like to make is that it does not insure permanency when it is a form of contract that is an administrative form that can be changed and cause as much injustice and difficulty as the Supreme Court decision brought to our attention.

I would like to put on the record the aims and objectives of our association. The No. 1 aim is to establish by law the fundamental principle of American justice that the parties to a contract with the Federal Government have the right of judicial review of disputes which arise; two, to have this right without the necessity of having to assassinate the character of a representative of the Government by having to accuse him of the deliberate intention of cheating or being dishonest; three, we would like to provide an opportunity for court review of the few cases which have been denied court review because of the Wunderlich decision. We believe that H. R. 1839 and S. 24 will accomplish this result.

The CHAIRMAN. Thank you.

Mr. WINKELMAN. Thank you for the privilege of appearing.

Mr. FOLEY. Mr. Simmons.

STATEMENT OF ELWYN L. SIMMONS, PRESIDENT, THE J. L. SIMMONS CO., INC.

Mr. SIMMONS. My name is Elwyn L. Simmons. I appear before you as president of the J. L. Simmons Co., of Chicago, Ill., a firm whose predecessors have engaged in business as general contractor for over 100 years and has completed numerous projects for the United States.

At the hearings held before this subcommittee on July 30, 1953, I testified concerning the urgent need for legislative relief from the interpretation placed by the Supreme Court, in the Wunderlich decision, on the disputes clause of the standard form of Government contract, and pointed out that since that decision Government contractors, for all practical purposes, have been deprived of any judicial review of administrative decisions under the disputes clause. I therefore supported S. 24 and its companion bill, H. R. 1839.

Since that time, however, the Comptroller General, by letter dated December 30, 1953, which the chairman read yesterday, has submitted to this committee a proposed substitute draft for these bills. This substitute, as stated by the Comptroller General, was prepared to meet objections of certain industries against giving the General Accounting Office express statutory authority to review administrative decisions under the disputes clause, and is designed to give the General Accounting Office no more authority in this connection than it had before the Wunderlich decision. The Comptroller General states that there is little or no opposition to this substitute by several industry groups or by the interested administrative agencies.

In view of the urgent need for legislation, I would like to add my voice in support of the substitute bill. It would permit review of agency decisions not only if they were fraudulent but also if they were capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or were not supported by substantial evidence. In my opinion, the possibility of such a review would put us on a more equal footing in our negotiations with Government contracting officers and would restore the situation which existed prior to the Wunderlich decision. I therefore heartily endorse the proposed substitute.

I wish to thank the committee for this opportunity to appear before it again. In other words, we need relief.

Thank you, sir.

Mr. FOLEY. Mr. Gaskins.

STATEMENT OF JOHN W. GASKINS, ATTORNEY, WASHINGTON, D. C.

Mr. GASKINS. Mr. Chairman, yesterday morning I filed with the committee counsel a statement urging the adoption of the proposed bill of the Comptroller General as set forth in his letter of December 30, 1953, to this committee. I would like to have that statement filed and made a part of my testimony. Since then I have had an opportunity to hear the testimony of some 7 or 8 witnesses. I thought I could possibly be more useful to the committee if I would direct attention to some of the questions which the committee asked various witnesses which I did not think were fully answered. (The statement referred to appears at end of Mr. Gaskins' oral testimony.)

I should say that I am a member of King & King, 1620 I Street NW., the law firm which prosecuted the Wunderlich case in the Court of Claims. We won it there, and we lost it in the Supreme Court. Our firm has been interested in these matters since 1866, and our principal activities are in connection with the prosecution of claims under Government contracts.

Yesterday the question arose whether the Wunderlich decision really changed the law as it existed prior to the Wunderlich decision, and Mr. Phillips, I believe, expressed what he characterized as a minority view that it did not. From time to time reference has been made to the Supreme Court decision in the Ripley case. That was the case decided in 1911. The citation is 223 United States Reports, and I should like very briefly to refer to what the Supreme Court said in 1911 with respect to the obligation of a contracting officer. It said this:

"But the very extent of the power and the conclusive character of his decision raises a corresponding duty that the agent's judgment should be exercised not capriciously or fraudulently but reasonably, with due regard to the rights of both the contracting parties. The finding of the court that the inspector's refusal was a gross mistake and act of bad faith, therefore, leads to the conclusion that the contractor was entitled to recover the damages caused thereby."

Now, when the Supreme Court in 1911 referred to capricious conduct and to the responsibility of the contracting officer or the agent to act reasonably, with regard to the rights of both parties, I think that it was announcing a doctrine which was much more liberal than the doctrine announced in the Wunderlich case, which talks about conscious wrongdoing and intention to cheat or to be dishonest. So I feel that the law has been very materially changed since 1911, and I think also that the Court of Claims feels that the law has been changed, because consistently in that court, before the Wunderlich decision, administrative decisions have been set aside if they were arbitrary or capricious or so grossly erroneous as necessarily to raise the implication of bad faith.

The present rule that has been announced by the Supreme Court is impossible to comply with. It involves proving a mental state on the part of the deciding officer, which I do not believe any contractor will ever be able to prove. The Wunderlich decision was rendered in 1951, and I know of no case in the Court of Claims in the last 2 years in which the contractor has been successful in meeting the burden

of proof imposed by the Wunderlich decision. I think it is reasonable to suppose that none ever will if that rule continues.

There is a very valid need for legislation in this field for a reason that has not been discussed before the committee up to the present time. This relates to the treatment which the contractors receive when they appear before these various departments and agencies that have the administration of Government contracts. Mr. Niederlehner, the representative for the Department of Defense, related yesterday that in his Department they had a hearing procedure. Well, that is true. They do have a hearing procedure, but it is the only department to my knowledge which even closely approximates or approaches the form of a quasi-judicial review in these matters. Let us take, for instance, the Veterans' Administration, which presently is engaged in letting millions of dollars worth of work involving the construction of veterans' hospitals. Very substantial disputes arise in connection with such work. I am presently interested in one now where the amount of the claim is approximately $2 million. Several subcontractors have failed as a result of the financial hardship that was imposed by the contracting officer's ruling.

But what processes of judicial review do we have before the Veterans' Administration? It is briefly this: We go with our witnesses to a board which they have constituted. We put our witnesses on the stand and we ask them questions. The board will ask questions from time to time, and when our witnesses have stopped speaking the hearing is ended. There is no provision whatever for the appearance of any Government witnesses. The contractor is given no opportunity to cross-examine any Government witnesses. At the end of the hearing, sometime later the contractor is supplied with a written statement purporting to set forth what the hearing board proposes to recommend to the head of the department as his administrative decision, and we are invited to make any objections to it. Well, we can make those objections, but we do not know what information the board has obtained from the contracting officer. The Board frankly admits that it will confer with the contracting officer regarding this dispute, but we will not be present. I can produce decisions where the board stated that it had conferred with the contracting officer and had been advised certain things. I can recall one case where they referred to an exhibit that they had obtained from the contracting officer. We wrote, asking for the exhibit, but we have never gotten the exhibit. That is a situation which exists with respect to hearings before the Veterans' Administration.

I will cite one more example. What happens in the Bureau of Reclamation, which annually spends millions of dollars in connection with reclamation projects, flood control projects and things of that character? Incidentally, the Wunderlich case arose out of the Bureau of Reclamation. You file a claim in writing, asking for a certain amount of money. If you do nothing more, you will get back a letter constituting the final decision. If you insist upon being heard, then you can go down and talk to an attorney in the Solicitor's Office, who will listen to what you have to say. You will not be confronted by any Government witnesses. You will not be permitted to examine the contracting officer or his representatives. And later you will be presented with a decision which possesses all of the finality which the present form of contract and the Wunderlich decision gives to it.

They are not exceptions to the rule. They are the general situation which prevails in matters of this kind, but contractors have become so hardened to this procedure that they more or less take it as a matter of course because they knew that they were assured of uniform treatment in the courts if they felt aggrieved as a result of those decisions. The Court of Claims for many, many years has consistently set aside those decisions, regardless of the hearing procedures, if it found that they were arbitrary or capricious or so grossly erroneous as necessarily to raise the implication of bad faith. Now, today, we do not even have that uniform protection in the courts, and that is one reason why we should have legislation on the subject.

Such need is pointed up all the stronger I think by the fact that there is no established uniform procedure for the hearing of these disputes in the Government.

Mr. WILLIS. At this point, so the record will be chronological, Mr. Macomber pointed out that as worded the bills might result in appellate review rather than a de novo review. Do you read those bills that way, or what is your opinion?

Mr. GASKINS. I do not see how they possibly could result in a de novo review, because——

Mr. WILLIS. Appellate review.

Mr. GASKINS. I thought you said a de novo review.

Mr. WILLIS. No. He said pre-Wunderlich the review was de novo and this will mean appellate. That is what I understood him to say.

Mr. GASKINS. Representative Willis, we have never had a de novo review on these matters since the use of the disputes clause. Every contractor who goes into the Court of Claims for all practical purposes has one hand tied behind his back because he cannot prevail unless he can show that the decision was arbitrary or capricious or so grossly erroneous as necessarily to imply bad faith.

Mr. WILLIS. So you do not agree that pre-Wunderlich the review was strictly de novo?

Mr. GASKINS. No, sir, they have never been de novo.

Mr. WILLIS. Since the disputes clause?

Mr. GASKINS. Since the disputes clause they have not been de novo, sir.

Mr. WILLIS. And do you contemplate any different type of review, aside from the question of going forward with the proof? You do not anticipate any difference in type of review, it would still be appellate?

Mr. GASKINS. It will be an appellate review, but it will have one big additional advantage.

Mr. WILLIS. I follow that entirely, but I just wanted to know your idea of whether it is strictly de novo or appellate.

Mr. GASKINS. Yes, sir. It will have this additional advantage, which I think is very real: All of the bills that are before the committee today, including the Comptroller General's proposed draft, with the single exception of Representative Celler's bill, add the statement that the decision must be supported by substantial evidence. Now, that will be of very great value to contractors, because it will result in these various department and agencies feeling that they will have to produce their witnesses at these hearings and permit the contractor to examine them, in order to have in the record some substantial evidence to support their decisions when they go up on appeal

to the court. I do not feel that they will any longer run the risk of refusing to put their proof in the record where it will be exposed to the cross-examination of the contractor. So 3 of the bills which are before the committee today would give that very decided additional advantage.

Mr. WILLIS. Do you not feel that perhaps there is some merit in the argument of the agencies that the substantial evidence rule in all honesty might be a little broader than the jurisprudence before Wunderlich?

Mr. GASKINS. Representative Willis, there are some cases where the court has recognized the substantial evidence rule in connection with Government contracts. The substantial evidence rule has already received the stamp of approval of Congress by its inclusion in the Administrative Procedure Act. For that reason, it is nothing new. The meaning of the substantial evidence rule has been interpreted by hundreds of decisions which have been rendered under that act.

I would also like to point out that there is no uniformity today in the disputes clauses in Government contracts. The committee has heard two witnesses on that. I believe Mr. Niederlehner, representing the Department of Defense, said that his Department's contract had now been changed to permit a limited judicial review, and he also said that it was his understanding, which I believe was confirmed by the representatives of the General Services Administration, that their form had presently been changed to include a limited judicial review as far as construction contracts were concerned. But these are only two of the many agencies in this Government which are engaged in letting important contracts. As far as I know—and I try to keep current in these matters—there has been no change whatever in the form of contract which the Veterans' Administration uses. There has been no change whatever in the form of contract which the Bureau of Reclamation uses. So we are not assured of any uniformity in the Government contract at all, even though certain representatives of Government agencies have indicated that they are willing to or have amended their own present forms. There is no assurance whatever that that will be a similar general approach on the part of all of the departments which are engaged in this type of contract work.

Next, even if every department agreed to the proposed changes in the contract to permit a limited judicial review on disputed questions of fact, that would still leave the very real problem of what to do with provisions in the specifications relating to disputed questions of law. None of the so-called amendments which the committee has been told are now being made in contracts covers disputed questions of law.

Mr. WILLIS. Or mixed questions of law and fact?

Mr. GASKINS. No, sir. They simply relate to disputed questions of fact. That is not going to be corrected in the absence of legislation. We know, for instance, that there is a tendency on the part of the Government specification writers today to put in the specifications, as distinguished from the standard form of contract, provisions which will give them vastly more authority than they have under the standard form of contract with respect to disputed questions of fact. They are given the right to interpret the drawings, the plans, the specifications. Well, that is probably the most important part of the docu-

ments. When you empower a Government man not only to decide all disputed questions of fact, but also all disputed questions of law, I submit that the signing of a Government contract is tantamount to the signing of a blank check. You are leaving it all entirely to him to decide the propriety of his own acts.

Mr. WILLIS. Do you still have contracts in existence with the all disputes clause as limited to disputes of fact?

Mr. GASKINS. The all disputes clause was a development of PWA, sir. When work was very hard to get, we found the Government revising PWA Form 51 to eliminate questions of fact and make it all disputes. A case involving that question was presented to the Supreme Court in *McShain* v. *United States*, and the Supreme Court held that that was a valid provision. Well, after PWA was over they accomplished the same purpose by another means. They restored the original contract provision which related to disputed questions of fact, but when in the specifications they said that if the contractor feels aggrieved as a result of any ruling of the contracting officer on any question arising out of this contract, he shall take an appeal and the decision on appeal will be final. The question of validity went to the Supreme Court in the case of *Moorman* v. *United States*, and again the Supreme Court held that it was perfectly all right for these Government officers to be given that authority.

I think that it is fundamentally wrong that the Government should be given this authority, and I think that it can be corrected only through the medium of legislation.

Yesterday there was some discussion whether or not the enactment of legislation of this type would result in a flood of litigation. Mr. Phillips was testifying at the time, and frankly I do not recall whether Mr. Phillips advised the committee yesterday that there would be a flood of litigation or not, but I do know that when he was discussing the position of the Department of Justice in the last Congress before the Senate Judiciary Committee in connection with S. 2487 he said this: "We anticipate that its enactment would constitute an open invitation to a flood of litigation."

Our office, in order to answer this assertion, made an examination of the Court of Claims decisions which had been rendered over a period of 15 years prior to the Wunderlich decision relating to finality of decision. We found as a result of that examination that there are exactly 16 cases in which the Court of Claims had overruled the decision of a contracting officer. We found that there were exactly 32 cases in which the Court of Claims had sustained a decision of the contracting officer. We ignored those decisions which turned upon the question whether or not the contractor had appealed in time. They were technical questions which we did not think were germane to this point. In any event, over a period of 15 years we had 48 cases on this point, or approximately 3 cases per year. If we are going to restore substantially what the contractor had prior to the Wunderlich decision and give him a limited appeal to the Court of Claims, I most respectfully submit that there is no real danger of there being any flood of litigation as a result of any of the bills that are presently before this committee.

I think I should say that those cases with their proper citations appear as part of the statement which I have asked leave to file.

I would like to discuss briefly Representative Celler's bill. I think possibly the bill does not do what it should do, because it relates only to disputed questions of fact and does not cover all disputes including disputed questions of law. It contains no provision prohibiting the future inclusion in Government contracts provisions with respect to questions of law, and it contains a 1-year statute of limitations.

The committee yesterday seemed very much interested in what the statute of limitations should be in these cases. Well, here is a situation that might well arise. Due to the size and complexity of Government contracts today, it is not at all infrequent that a contruction contract will take 3 or 4 years to be completed. Now, under the terms of the contract, where a dispute arises we must note an appeal within 30 days. So let us assume in the first year of the work an appeal is noted within 30 days and it is decided within a reasonable time and that the contractor feels aggrieved as a result of the decision. Then let us further assume that in the fourth year a dispute arises and the contractor within 30 days takes his appeal and he feels aggrieved as a result of that decision. He would not bring a suit in the Court of Claims under his first appeal until he knew what was going to happen in the second appeal, because he might be accused of splitting a cause of action, which you cannot do in the Court of Claims. But after the second decision and within the 6-year statute of limitations allowed in the Court of Claims he would then bring a suit on the two appeals. Well, under Representative Celler's bill he would find one set of standards applicable to his first appeal, namely, those which prevailed under the Wunderlich decision, and a second set of standards applicable to the second appeal.

Then there is another valid reason why the relief which this committee should recommend should go beyond a 1-year period. There are many contractors under present contracts who find themselves engaged in disputes with the Government. Some of those contractors have taken their disputes into the courts. All of those plaintiffs in the Court of Claims have had the rules of the game changed since the time that they instituted their suits, and many of the contractors who entered into contracts prior to the Wunderlich decision, which contracts are not yet completed, would find that the rules of the game had been changed if the relief should apply only to a decision which became final within 1 year prior to the date of the passage of the legislation.

I felt after reading these bills that there was no real occasion to be very much concerned as to whether or not they were retroactive, because I thought that they spoke as of the date of enactment, and any case which had not been subjected to judicial review as of that date would come within the scope of the remedial legislation. But if the committee should feel otherwise and think there is some doubt as to the retroactivity of any of the bills, I would suggest the inclusion of about nine words appearing immediately after the language——

Mr. WILLIS. Which bill?

Mr. GASKINS. This would apply, sir, to any of the bills.

Mr. WILLIS. Let us take H. R. 1839, for instance.

Mr. GASKINS. All right, we will take H. R. 1839. In line 7 of the first page, where you use the words "shall be pleaded," I would insert after that "in any suit now filed or to be filed." I think that would cover all possible contingencies.

I see no danger in the proposition that old contracting officer's decisions might be reopened as a result of this legislation, because under the terms of the contract all of those decisions are final after 30 days unless the contractor has appealed. I also see no justification for fearing that any of this legislation would revive old claims that are barred by the statute of limitations. The statute of limitations in the Court of Claims is 6 years, and it is not optional with the Government whether it will plead it. It is a jurisdictional statute, and the minute the cause of action becomes more than 6 years old it is automatically outlawed.

Mr. FOLEY. How would that affect a pending suit now?

Mr. GASKINS. Mr. Foley, I think the present bills would be applicable to any administrative decision in any case which had not been judicially decided by a court up to the time of the approval of this legislation.

Mr. WILLIS. Let me ask you this question. Suppose a suit was filed last year and, seeking to comply with the Supreme Court holding, the complainant alleged that the contracting officer was guilty of fraud and cheating and all that, and that case has not been tried. Under your proposal he would not have to amend his complaint and just would not have to offer that kind of proof, or would he have to amend his pleadings?

Mr. GASKINS. I think he should amend his pleadings to come under the new bill.

Mr. WILLIS. I think he should, but would your wording permit it?

Mr. GASKINS. If it applies to any suit now on file or to be filed, it covers every contingency.

Mr. WILLIS. I think purely offhand that that may be a possible solution, because we certainly would not be reviving claims that are barred by the statute of limitations.

Mr. GASKINS. No, sir.

Mr. FOLEY. It has been brought to our attention here that there are certain suits now in the Court of Claims before the Commissioners. How would your proposal affect those cases?

Mr. GASKINS. Yes, there are certain suits pending in the Court of Claims, and I represent some of the plaintiffs. I think that if any of these bills become law prior to the time that I have to argue those cases to the Court of Claims that the court could apply the provisions of this law to the consideration of those claims. Now, I also represented Wunderlich, but the Wunderlich case has been decided. I do not believe that this legislation would cover Wunderlich. I think possibly Mr. Wunderlich should ask for special relief later on.

Mr. FOLEY. Then the bills in their present form with your proposed amendment would cover those situations that Mr. Willis and I have just asked you about?

Mr. GASKINS. I think so, sir. I believe that concludes all the remarks that I would like to make, Mr. Chairman.

The CHAIRMAN. Thank you.

(The prepared statement submitted by Mr. Gaskins follows:)

STATEMENT OF JOHN W. GASKINS, ATTORNEY, WASHINGTON, D. C.

I am a practitioner before the bar of the District of Columbia, and a member of the law firm of King & King of Washington, D. C., which since 1866 has represented Government contractors before the various departments and con-

tracting agencies, the Federal courts, and the United States Court of Claims. We won the Wunderlich case in the United States Court of Claims and lost it before the Supreme Court on November 26, 1951.

I should like to review briefly what the legal situation was before the Wunderlich decision and I have several reasons to advance as to why the corrective legislation proposed by the Comptroller General in his letter to the Chairman of the Judiciary Committee dated December 30, 1953, should be enacted.

Since 1911, when the Supreme Court decided *Ripley* v. *United States* (223 U. S. 695), the law with respect to judicial review of administrative decisions rendered under the finality clauses of Government contracts has been that the judgment of the contracting officer should not be exercised capriciously or fraudulently, but reasonably with due regard to the rights of both parties. Since that time it has been uniformly held that to possess finality the contracting officer's decision must not be arbitrary, capricious, or so grossly erroneous as necessarily to raise the implication of bad faith.

With the rendition of the Wunderlich decision on November 26, 1951, this rule was changed and it is now the law that the decision of an administrative official may not be set aside by any court unless the contractor can affirmatively prove that such administrative official was guilty of conscious wrongdoing and had the intention to cheat or to be dishonest.

It is, of course, impossible to prove that any administrative official in the rejection of a claim intended to cheat or to be dishonest with a contractor. In my own experience of some 25 years in handling this type of case, I have never encountered a disallowance of a claim which I thought was motivated by an intention to cheat or to be dishonest. I have encountered many cases where it was my considered opinion that the deciding administrative officia. acted arbitrarily or capriciously with respect to the evidence that was presented to him, and I have also encountered cases where I believed that his decision was grossly erroneous either because of his failure to understand the problem involved or because of the insufficiency of the material that was placed before him for consideration by subordinates upon whom he necessarily had to rely. I have also seen cases where I thought that the action taken was not supported by substantial evidence.

The end result of the Wunderlich decision is that by restricting the standards of review to whether a deciding officer intended to cheat or to be dishonest, Government contractors in all fields are today deprived of any review by the judiciary of any factual dispute that might arise out of the performance of their contracts. I find it difficult to reconcile the inequity of this situation with the concept under our system of law that contracts should be mutually enforceable.

There are many cogent reasons why legislation should be enacted correcting the situation created by the Wunderlich decision.

When similar legislation was being urged before the Senate Judiciary Committee it was there emphasized that a refusal to provide a forum for the determination of disputes arising under contracts would only result in additional cost to the Government in the letting of contracts. This is so because such a situation would attract less competent and more speculative contractors to Government work, thereby increasing the possibility of an inferior grade of work. It seems only reasonable to suppose that if a contractor knows in advance that he is to receive no protection from the courts he will either refuse to bid on Government work or will place contingencies in his bid proportionate to the risk involved. Either of these, I believe, would be detrimental to the interests of the Government in obtaining the performance of work on a free and competitive basis.

A further need for providing judicial review of arbitrary or capricious acts of Government officers arises from the lack of uniformity which presently exists in the various departments and agencies for hearing of disputes arising under Government contracts. Where the United States Corps of Engineers is concerned there is a hearing procedure, but frequently Government witnesses possessing firsthand knowledge of the facts are not called by the Government and may not be cross-examined. The same situation prevails in the Veterans' Administration, where provision is made only for the hearing of contractors' witnesses. Experience shows that no satisfactory solution of a disputed question of fact in a quasi-judicial proceeding is ever going to be reached unless the witnesses of both sides appear and are subjected to cross-examination. In the Bureau of Reclamation, where the Wunderlich case arose, and where millions

of dollars worth of contract work is let, there is no hearing procedure whatever. A contractor files his claim in the ordinary form of a letter. He may if he wishes discuss the matter with an attorney in the Solicitor's Office of the Department of the Interior. There is no procedure for questioning any witnesses or for sifting conflicting views. Later a unilateral decision is rendered which is final. Similarly, there is no formalized procedure before the National Capital Housing Authority.

Thus the standards of administrative review differ vastly between the various agencies and departments concerned, but up to the date of the Wunderlich decision aggrieved contractors still possessed the right to receive uniform treatment in court. If the administrative decision, independently of the procedures used, was arbitrary, capricious, or so grossly erroneous as to imply bad faith, it was set aside. Today even that protection has vanished and a contractor must affirmatively show that the deciding officer actually intended to cheat him or to be dishonest. Affirmative proof of such a mental state on the part of the deciding officer is impossible to obtain. There has not been one case decided by the Court of Claims since the Wunderlich decision in 1951 which could meet this burden of proof, and I have no hesitancy in predicting that there never will be such a case. For all practical purposes there is no appeal to the courts.

The legislation under consideration, namely S. 24, H. R. 1839, and the draft proposed in the Comptroller General's letter of December 30, 1953, also provides in the second section that Government contracts shall not contain a provision making final the decision of an administrative official on a question of law. Such a provision is most necessary because in recent years there has been an increased tendency for administrative officers to insert provisions in the specifications or in the contract which not only give them the right to finally determine disputed questions of fact but also give them the right to finally determine what the contract means. Such provisions have been held to be legal and enforceable by the Supreme Court in *McShain* v. *United States* (308 U. S. 512), and in *United States* v. *Moorman* (338 U. S. 457). When a situation exists that permits the contracting officer not only to finally determine the facts in the case but also to finally declare the legal obligations of the parties under the contract, then for all practical purposes, I respectfully submit, the signing of a Government contract is tantamount to signing a blank check.

Heretofore, reservation of the right to determine disputed questions of fact has always been justified by the departments on the ground that technical questions were involved which called for technical knowledge on the part of the deciding officers. Independently of the avenues of abuse that may be opened by this position, such thinking can certainly not justify an attempted enlargement to include the privilege of finally determining the legal effect of the contract. We have courts which have successfully performed this function since the inception of our form of government. The fears that the Comptroller General expresses on this subject in his letter of December 30, 1953, to the chairman of the House Judiciary Committee are not idle ones, for I have observed a number of occasions where contractors stood helpless in the face of questionable legal conclusions of administrative officers determining the meaning and effect of their contracts.

Before the Senate Judiciary Committee in February and March 1952, there was under consideration S. 2487, a bill to permit judicial review of decisions of contracting officers, etc. The position was taken by various Government witnesses that legislation was not necessary to correct the condition created by the Wunderlich decision because by departmental regulation provision could be made in the contract itself for judicial review of administrative decisions (Howland, Associate General Counsel of the Air Force, p. 91; Macomber, Assistant General Counsel of General Services Administration, p. 98; Seltzer, Corps of Engineers, p. 102).

It is believed that this condition can only be permanently corrected by legislation. Today, more than 2 years after the Wunderlich decision, there has been no effort to correct the situation by inclusion of protective clauses in the contract with the single exception of the Department of Defense. In the Bureau of Reclamation the Wunderlich case still controls. Further, if it is left to the discretion of the departments or agencies concerned to include a provision in a contract which would authorize judicial review, the exercise of that same discretion could subsequently eliminate the provision. This very point it made by the Comptroller General in his letter to Representative Reed dated December 30, 1953, in which he sets forth specific recommendations with respect to legislation which he states

wouid be agreeabie to him and to various industry groups who had formeriy opposed S. 24.

Secondly, to depend only on administrative action for the incinsion of language in fnture contracts would divest aii contractors under existing contracts of any protection from the date when the Wunderlich decision was rendered on November 26, 1951. There are hundreds of disputed cases pending before the various administrative bodies awaiting decisions, and a few before the United States Conrt of Claims, ail of which are presently controlled by the Wunderlich decision in the absence of iegisiation similar to that proposed by the Comptroiler General. It wouid seem particularly appropriate that these contractors, many of whom during the performance of their work experienced a change of the rules regardiug disputes, should receive the protection which they had at the time they entered into these coutracts. While oniy a small fraction of such disputes may ever get to the Court of Claims, knowledge on the part of administrative officers that their decisions conid be subjected to judiciai review wonid at ieast permit negotiation and settiement of such disputes to proceed on the same footing which existed prior to the Wuuderiich case.

It was said before the Senate Judiciary Committee by oue Government opponent to any iegislation on this subject that enactment of iegislation "would constitute an open Invitation to a flood of iitigation" (Phiips, p. 16). With a view to answering such an assertion our office made a review of the Court of Claims decisions for the past 15 years preceding the Wunderlich decision. We found only 16 cases in which the court had set aside a determination by an administrative officer authorized to make a final decision pursuant to the standard disputes ciause or a similar provision. We were aiso able to find in this same 15-year period 32 cases in which the Court of Claims had upheld the administrative determination made pursuant to a disputes article or similar provision. Thus 48 cases were decided in 15 years, or approximately 3 cases per year. I have appended both lists of cases to my written statement.

There is, therefore, no justification for the fear that a flood of litigation will result from the proposed legislation. Contractors are not interested in undergoing the troubie, expense and loss of time involved in court proceedings. They are, however, interested in having the Court of Claims police the field of their negotiations with the various departments for only then are they able to negotiate with such departments on anything approximating an equal footing. It is fundamentally wrong that an interested party to a dispute should be given the power to finally decide ali disputes to the point where the courts are deprived of jurisdiction in the absence of proof of intention to cheat or to be dishonest on the part of such interested deciding officer. It is not unlike one of the interested parties being constituted both the judge and jury in questions concerning the propriety of his own conduct. This comparison is not too far fetched, for Mr. Justice Douglas in his dissenting opinion in the Wunderlich case, in referring to the effect of the Court's decision, said:

But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse, or captious. He is allowed the power of a tyrant although he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected.

It is also pertinent to note that the inclusion of a disputes clause in a Government form of contract is not a matter of negotiation. Any bid which attempted to eliminate it would immediately be characterized as irreguiar and would not be considered. True, no one has to bid on a Government contract. But the inclusion of such ciauses can only have the effect of making Government work iess attractive to more responsible bidders, and in the long run is bound to affect competition. The only logicai consequence of this can be to increase the cost of Government work to the Government's disadvantage.

I beiieve that the hiii suggested by the Comptroiier Generai in his letter to Representative Reed dated December 30, 1953, is the best biii presently before this committee and that it is adequate in aii particulars and respects. The phrase "not supported by substantiai evidence" should require the various administrative departments and agencies to produce their witnesses before their various hearing officers so that decisions will be based on substantial evidence. The ianguage suggested by the Comptroiier General is consistent in all respects with the standards of review prescribed by the Administrative Procedures Act as far as that act is applicable to the present situation. The Comptroller General's proposed ianguage has the very considerabie added attraction of meeting the

objections heretofore interposed by various industry groups to S. 24, as his letter of December 30, 1953, indicates. I have seen letters from at least two industry groups who formerly opposed S. 24, which letters indicate no opposition to the Comptroller General's draft as contained in his letter of December 30, 1953.

Such legislation as the Comptroller General suggests would restore the necessary policing effect which the Court of Claims had over administrative decisions prior to the rendition of the Wunderlich decision; would tend to eliminate the gambling and speculative aspect of bidding on Government work, and would restore the confidence of an industry which quite unexpectedly has found itself without any forum into which it might take its legitimate disputes arising out of the performance of a contract.

I wish to thank the committee very much for the opportunity which has been afforded me to makes these observations.

CASES IN WHICH THE COURT OF CLAIMS, DURING THE 15-YEAR PERIOD PRIOR TO WUNDERLICH DECISION, UPHELD THE DETERMINATION OF AN ADMINISTRATIVE OFFICER AUTHORIZED TO MAKE A FINAL DECISION PURSUANT TO THE STANDARD DISPUTES CLAUSE OR SIMILAR PROVISION

1. *Schmoll, Assignee* v. *The United States* (91 C. Cls. 1).
2. *Valley Construction Company* v. *The United States* (92 C. Cls. 172).
3. *Western Construction Company* v. *The United States* (94 C. Cls. 175).
4. *General Contracting Corp.* v. *The United States* (96 C. Cls. 255).
5. *B-W Construction Company* v. *The United States* (97 C. Cls. 92).
6. *Caribbean Engineering Company* v. *The United States* (97 C. Cls. 193).
7. *Consolidated Engineering Company* v. *The United States* (97 C. Cls. 358).
8. *Fleisher Engineering & Construction Company* v. *The United States* (98 C. Cls. 139).
9. *John M. Whelan & Sons, Inc.* v. *The United States* (98 C. Cls. 601).
10. *Rego Building Corp.* v. *The United States* (99 C. Cls. 445).
11. *Merritt-Chapman & Whitney Corp.* v. *The United States* (99 C. Cls. 490).
12. *Hunter Steel Company, Inc.* v. *The United States* (99 C. Cls. 692).
13. *R. C. Huffman Construction Company* v. *The United States* (100 C. Cls. 80).
14. *Frazier-Davis Construction Company* v. *The United States* (100 C. Cls. 120).
15. *Fred M. Comb Company* v. *The United States* (100 C. Cls. 240).
16. *King* v. *The United States* (100 C. Cls. 475).
17. *L. E. Myers Company, Inc.* v. *The United States* (101 C. Cls. 41).
18. *Silberblatt & Lasker, Inc.* v. *The United States* (101 C. Cls. 54).
19. *A. Guthrie & Company, Inc., et al.* v. *The United States* (102 C. Cls. 472).
20. *Crystal Soap & Chemical Company, Inc.* v. *The United States* (103 C. Cls. 166).
21. *McCloskey & Company* v. *The United States* (103 C. Cls. 254).
22. *Firemen's Fund Indemnity Company* v. *The United States* (104 C. Cls. 648).
23. *Crowley* v. *The United States* (105 C. Cls. 97).
24. *American Transformer Company* v. *The United States* (105 C. Cls. 204).
25. *E. J. Albrecht Company, Inc.* v. *The United States* (105 C. Cls. 353).
26. *S. J. Groves & Sons Company* v. *The United States* (106 C. Cls. 93).
27. *Guion, Trustee* v. *The United States* (108 C. Cls. 186).
28. *Ashville Contracting Company* v. *The United States* (110 C. Cls. 459).
29. *Mitchell Canneries, Inc.* v. *The United States* (111 C. Cls. 228).
30. *J. A. Jones Construction Company, Inc.* v. *The United States* (114 C. Cls. 270).
31. *Holland Page et al.* v. *The United States* (120 C. Cls. 27).
32. *DuBois Construction Corp.* v. *The United States* (120 C. Cls. 139).

CASES IN WHICH THE COURT OF CLAIMS, DURING THE 15-YEAR PERIOD PRIOR TO THE WUNDERLICH DECISION, OVERRULED THE DETERMINATION OF AN ADMINISTRATIVE OFFICER AUTHORIZED TO MAKE A FINAL DECISION PURSUANT TO THE STANDARD DISPUTES CLAUSE OR SIMILAR PROVISION

1. *Ambersen Dam Co.* v. *United States* (86 C. Cls. 478).
2. *H. B. Nelson Construction Co.* v. *United States* (87 C. Cls. 375).
3. *Callahan Construction Co.* v. *United States* (91 C. Cls. 538).
4. *Baruch Corporation* v. *United States* (92 C. Cls. 571).
5. *Hirsch* v. *United States* (94 C. Cls. 602).

6. *Ruff* v. *United States* (96 C. Cls. 148).
7. *Langevin* v. *United States* (100 C. Cls. 15).
8. *Needles* v. *United States* (101 C. Cls. 535).
9. *Bein* v. *United States* (101 C. Cls. 144).
10. *Henry Ericsson Co.* v. *United States* (104 C. Cls. 397).
11. *De Armas* v. *United States* (108 C. Cls. 436).
12. *Loftis* v. *United States* (110 C. Cls. 551).
13. *Joseph Meltzer, Inc.* v. *United States* (111 C. Cls. 389).
14. *Great Lakes Dredge and Docks Co.* v. *United States* (116 C. Cls. 679 and 119 C. Cls. 504).
15. *Newhall-Herkner* v. *United States* (116 C. Cls. 419).
16. *Penner Installation Co.* v. *United States* (116 C. Cls. 550).

Mr. FOLEY. Mr. David Reich.

STATEMENT OF DAVID REICH, VICE CHAIRMAN, COMMITTEE ON FINALITY CLAUSES, SECTION OF ADMINISTRATIVE LAW, AMERICAN BAR ASSOCIATION

Mr. REICH. If it please the committee, my name is David Reich. I am appearing here on behalf of the American Bar Association, representing the section of administrative law.

We appreciate the opportunity to present the views of the American Bar Association here today. When the Wunderlich decision had been rendered, many persons in business and legal circles were very much concerned about the type of decision. It seemed particularly to lawyers interested in legal processes that it placed a contracting officer on a pedestal such as no other official in Government had. There is nothing so expert about a contracting officer that his decisions should be subject to review only if fraud were alleged and, as Mr. Justice Minton, speaking on behalf of the Supreme Court said, fraud meant an intention to cheat or be dishonest. That was an impossible standard, and the Court itself seemed to realize that, because it suggested if the standard of fraud adopted was not an appropriate one, Congress might do something about it. Very correctly, the Congress has been doing something about it, and that is the reason, of course, for this meeting today.

Soon after the Wunderlich decision, at the meeting of the American Bar Association held in San Francisco in 1952, there was much consideration given to this problem, and as a result of this consideration the house of delegates, which is the supreme body of the American Bar Association, adopted the following resolution:

> That it is the opinion of the American Bar Association that the determination of contracting officers and reviewing officials under the finality clause of Government contracts should be subject to judicial review, in accordance with the criteria of the Administrative Procedure Act, and that the section of administrative law be authorized and directed to advance appropriate legislation to that end.

The section of administrative law, pursuant to this resolution, has been giving much consideration to the various proposals that have been introduced, and at the same time it has been thinking of an appropriate proposal. We have reviewed the various proposals that are now before your committee, and while we feel that they are essentially the same and will overcome the effect of the Wunderlich and Moorman doctrines, we are concerned that many of these proposals introduce new terminology that has not been tested.

We think that in the Administrative Procedure Act, which was adopted in 1946 after many, many years of careful consideration and deliberation not only by the Congress but also by the various Government agencies, as well as by members of the bar and the public, criteria have been set down in the judicial review provisions of section 10 which should be pursued in the review of disputes cases. In that way we will have well-accepted terminology, terminology that is before the courts at all times, and we will not have new tests to be administered in a different way. There is a precedent for this. In the 82d Congress, in the Defense Production amendments for that year, there was a provision made that Walsh-Healey Act cases should be reviewed, and I quote, "in the manner provided in section 10 of the Administrative Procedure Act."

With this in mind, we have looked over the various bills. Take, for example, H. R. 1839, which is the companion bill to S. 24, and also H. R. 6946. The three bills provide that a final determination in Government contract cases can be upset where it is found to be fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith or not supported by reliable, probative, and substantial evidence. I wonder, and I think many other persons would wonder, whether that language would include "arbitrary" and "capricious" action on the part of an administrative official such as a contracting officer. If the Administrative Procedure Act provisions were used, there would be no question, because specific provision is made in the Administrative Procedure Act for review of cases where the action is arbitrary and capricious.

H. R. 3634, in our opinion, is not sufficiently broad, and it is also subject to other limitations. H. R. 3634 covers the Wunderlich theory but does not go into the Moorman doctrine. In other words, it does not prevent contracting officials from making final decisions on questions of law.

It seems to us in our system of jurisprudence that contracting officials should not be given final determinations or final decisions as to questions of law. That is the province of a court and not of an agency official, particularly an official such as a contracting individual.

We have a proposal which we have considered very carefully and which we would like to suggest to your committee. It appears on page 4 of the memorandum which I have submitted today. I would like to read it:

> Notwithstanding the presence in any contract entered into by the United States of a provision relating to the finality or conclusiveness of any decision of an agency official, board or other representative on questions of law or fact arising under such contract, judicial review as provided in section 10 of the Administrative Procedure Act may be had of any such decision by the contractor.

You will see from that that both questions of fact and law and so-called mixed questions of law and fact would be included in this one-section proposal. More than that, section 10, which is the judicial review provision of the Administrative Procedure Act, would be made directly applicable, so that new terminology or selected terminology would not have to be used.

Mr. WILLIS. Would you not be implying that the contracting officers may pass on questions of law?

Mr. REICH. Not necessarily. There are contracts presently, Mr. Congressman, which have such a provision, so that if there is such a provision this would allow review. It may be that another provision might be written to take care of cases in the future, to the effect that no contracts entered into in the future should contain any provision providing for finality decisions on questions of law. We were trying to encompass, if you will, the entire situation as it exists today, but we do not mean by that that we would like to see contracts written in the fashion that they are.

Mr. WILLIS. Your criticism of the Celler bill is that it says nothing about law, and you say thereby it may be implied that they can go into questions of law?

Mr. REICH. You practically admit they can pass on questions of law. I believe they can pass on appropriate questions of law, but according to our bill, even if they should, those questions of law as determined would not be final decisions. They would be reviewable by the court. But I agree with you that in the future contracts should not have such a provision. However, even if the existing contracts have that provision, this would provide for review.

Mr. WILLIS. Thank you very much.

(The prepared statement and draft of bill submitted by Mr. Reich follows:)

STATEMENT OF DAVID REICH VICE-CHAIRMAN, COMMITTEE ON FINALITY CLAUSES, SECTION OF ADMINISTRATIVE LAW, AMERICAN BAR ASSOCIATION

I am appearing here on behalf of the American Bar Association.

At the 75th annual convention of the association, held in 1952 at San Francisco, the following resolution was adopted:

That it is the opinion of the American Bar Association that the determination of contracting officers and reviewing officials under the finality clause of Government contracts should be subject to judicial review, in accordance with the criteria of the Administrative Procedure Act, and that the section of administrative law be authorized and directed to advance appropriate legislation to that end. (Reports of American Bar Association, Vol. 77, p. 130.)

The decision of the Supreme Court in *United States* v. *Wunderlich* (342 U. S. 98, 96 L. ed. 113 (1951)), coming as it did on the heels of *United States* v. *Moorman* (338 U. S. 457, 94 L. ed. 256 (1950)), caused deep concern in business and legal circles. The effect of these decisions is to place contracting officers of the Government in a unique position among agency officials. They are now clothed with almost absolute power over contract disputes cases which frequently involve millions of dollars. They can decide with finality questions of fact as well as questions of law and the contractor with the Government can seek relief in the courts only if he can allege and prove "conscious wrongdoing" on the part of the contracting officer, which Mr. Justice Minton, on behalf of the majority of the court in the Wunderlich case, equated to "an intention to cheat or be dishonest."

This is an impossible standard, as the majority of the court itself in Wunderlich must have recognized, when it stated "If the standard of fraud that we adhere to is too limited, that is a matter for Congress." (96 L. ed. at 116). The Congress itself was quick to take action. In the 82d Congress, the Senate passed S. 2487, which is identical in all respects with S. 24, which passed the Senate during the last session.

There is no valid reason today for placing a contracting officer on a pedestal of absolute authority subject only to the review of an appeal board within his own agency. A contracting officer does not necessarily have the expertness which is normally associated with persons who are authorized to make agency determinations. Frequently, a contracting officer is a member of the armed services. He may be assigned as a contracting officer for only a limited period, as but one of his tours of military duty. As contracting officer he may be on the staff of a general whose very command is concerned with the dispute to which this contracting officer is assigned. It is not unnatural for such a person to "think" the same way as his command, and to give more credence to evidence produced

by his fellow officers than to that presented by persons in private life. Such a contracting officer may not intend to do any wrong; unwittingly, he is just not impartial. Under the present ruling of the Supreme Court, his decision, however, would not be subject to court attack despite the fact that it may be patently arbitrary, capricious, or not in accordance with law.

As to the bills presently before your subcommittee, essentially they are the same. They would overrule the effect of the Wunderlich and Moorman cases. With this we are in agreement. The difficulty we have it that the proposed legislation would introduce new or insufficient terminology in place of the carefully selected language of the judicial review provisions of the Administrative Procedure Act. The purpose of this act was to create, in general, a measure of uniformity for court review. The proposed bills would not accomplish that.

For example, H. R. 1839, H. R. 6946, and S. 24 provide that a final decision in Government contract cases can be upset where it is found to be "fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence." The query arises whether this language would support a reversal of a decision which is arbitrary or capricious. Such a question would not be encountered under the precise language of the Administrative Procedure Act. There, specific provision is made for review of agency action which is arbitrary or capricious.

H. R. 3634 is not sufficiently broad. It does not cover the Moorman situation in that it does not prohibit a Government contract from containing a provision making an agency decision final on questions of law. It is fundamental to our system of justice that questions of law should be determined finally in our courts of law rather than in our administrative agencies. In this connection, the Administrative Procedure Act provides that the courts shall review all relevant questions of law arising in agency proceedings.

It is in view of these and other objections that the section of administrative law, on behalf of the American Bar Association, is suggesting that a bill covering the subject matter under consideration should read as follows:

"Notwithstanding the presence in any contract entered into by the United States of a provision relating to the finality or conclusiveness of any decision of an agency official, board or other representative on questions of law or fact arising under such contract, judicial review as provided in section 10 of the Administrative Procedure Act may be had of any such decision by the contractor."

There is precedent for this approach. In section 301 of the Defense Production Act of 1952, the Congress provided for judicial review of Walsh-Healey Act cases "in the manner provided in section 10 of the Administrative Procedure Act."

We appreciate the opportunity afforded to us to appear before you today.

Mr. FOLEY. Mr. Hines.

STATEMENT OF FREDERICK E. HINES, ON BEHALF OF AIRCRAFT INDUSTRIES ASSOCIATION OF AMERICA

Mr. HINES. Mr. Chairman, I appreciate very much the opportunity to appear today instead of yesterday, as scheduled. My plane was grounded at Memphis, and now that I am in Washington I rather wish I were back in California.

My name is Frederick E. Hines. From 1939 until 1952, I was corporation counsel for Douglas Aircraft Co., of Santa Monica, Calif. Since 1952 I have been vice president and finance and tax counsel for that company. In 1952 I conducted a law course on Government contracts in the graduate school of the School of Law, University of Southern California. My testimony today is on behalf of the Aircraft Industries Association of America, Inc.

The Aircraft Industries Association of America, Inc., is a trade association with 130 members representing almost all of the prime contractors with the Government in the aircraft field, as well as many of the subcontractors and suppliers. A partial representative list includes North American, Boeing, Lockheed, Convair, United Aircraft, Curtiss-Wright, Martin, General Electric, General Motors (Allison

Division), Westinghouse, Bendix Aviation, and AiResearch. Most of the contracts involved are of course with the Department of Defense, but other departments and agencies, such as the Atomic Energy Commission, also enter into contracts with various members of the association.

There is no need to repeat to this committee the history and background of this matter of the finality of decisions under Government contract disputes clauses. The previous Senate committee reports cover the matter as do many articles in legal and other publications. (Committee report on S. 2487, Rept. No. 1670, 82d Cong. 2d sess., June 4, 1952; Committee report on S. 24, Rept. No. 32, 83d Cong. 1st sess., February 4, 1953. See Cable, The General Accounting Office and Finality of Decisions of Government Contracting Officers, 27 New York Univ. L. Rev. 780 (1952)).

The problem and its solution are well stated in a letter dated February 21, 1953, from Roger Kent, then General Counsel, Department of Defense, to Hon. Chauncey W. Reed, chairman of the Committee on the Judiciary, concerning H. R. 1839, which the committee has in its files.

It is generally agreed that the use of a disputes clause with some degree of finality is a desirable procedure. It is also generally agreed that too great a degree of finality has been imposed by the decision of Supreme Court in *U. S.* v. *Wunderlich.*

Thus we have no basic disagreement with the objective of the legislation to remedy this situation. We do, however, have some question as to the necessity of legislation, and we believe that some of the provisions proposed in H. R. 1839 would utterly destroy the objective of finality of administrative decision and introduce new factors harmful both to the Government and to its contractors. These objectionable provisions have been revised, however, in the substitute bill submitted by the Comptroller General of the United States under date of December 30, 1953. Parenthetically, I might say this should not be called a substitute bill. It was based on the McCarran bill. It does follow the language of the McCarran bill to a great extent, and possibly should then be called an amended rather than a substitute bill. As stated by Admiral Ramsey, president of the Aircraft Industries Association, in his letter dated January 6, 1954, to your chairman, we make no objection to the terms of this revised bill. We do feel, however, that we have to say something about H. R. 1839.

In our opinion, section 1 of H. R. 1839 destroys the finality of decision and introduces needless complexities. Unless reasonable finality of decision is achieved within a reasonable time, the disputes clause would be better left out of Government contracts and the parties left to their remedies at law. Yet under this bill the General Accounting Office would have to pass on every dispute under every contract entered into by any department or agency. Unless cleared by the General Accounting Office, each decision could be reopened by the General Accounting Office without time limit, since no statute of limitations would run against the Government. Thus finality would be lost.

The uncertainties thus created would make it more difficult for contractors, especially small ones, to secure performance bonds or to

secure financing of the type fostered by the Assignment of Claims Act. The importance of financial certainty deserves great stress.

Mr. Roger Kent said in his letter, already referred to:

> To superimpose General Accounting Office review on existing disputes-clause procedures would not only create a completely new review, it would, as a practical matter, eliminate the usefulness of the disputes clauses themselves by destroying the concept of finality and dividing the responsibility for determining the merits of any given appeal. Undoubtedly, this would generate protracted and expensive disagreements among Government agencies, the General Accounting Office, and contractors' representatives. This would defeat the aims of both the Government and its contractors by making it impossible to accomplish the very purposes of the disputes clauses, that is, the achievement of proper and expeditious performance of contracts.

In agreeing to the usual disputes clause a contractor with the Department of Defense has permitted the other party to the contract to be the arbiter of all disputed questions of fact. The Government has recognized its responsibilities in this regard, and the Armed Services Board of Contract Appeals is an excellent and impartial body of a judicial character. But, having surrendered such rights of decision, it is hardly fair or just to ask a contractor also to submit to second guessing by a second and unrelated Government agency such as the General Accounting Office. The placing of any other governmental administrative agency in such a position would have equally unfortunate results. Such double administrative review is wholly unnecessary and wholly unfair to the contractor. This point alone justifies completely our position that this bill should not be enacted in its present form. The revised form of the bill does, we believe, minimize this problem.

I might elaborate a bit on what I mean by "minimize." It is still possible that the substitute bill might be interpreted, contrary to the statement in the prior committee reports, to enlarge the jurisdiction of the General Accounting Office with respect to decisions by heads of departments or appellate boards. But since the substitute bill, unlike H. R. 1839, H. R. 6946, and H. R. 3634, does not apply to initial decisions by contracting officers, it can have no effect upon the status of the General Accounting Office. I might point out that this substitute provision does follow in this respect the language and scope of the amended disputes clause of the Department of Defense referred to in prior testimony on behalf of the Department.

Furthermore, the status given the General Accounting Office by the bill is most indefinite. Apparently either the General Accounting Office or a court could act in a given matter, and it is not at all clear which would have the last word. Suppose the General Accounting Office finds that the evidence was in its opinion insufficient to sustain a decision in favor of a contractor. Then suppose that in this same matter the Court of Claims finds that the evidence was sufficient to support the decision. Does the General Accounting decision have, as the bill implies, concurrent status with that of the court? Since the General Accounting Office often refuses to follow court decisions, do we then have the spectacle of the General Accounting Office refusing to permit payment of the court judgment? Only the Supreme Court could settle that issue.

But it is said, even in the committee reports referred to above, that no new authority or jurisdiction is being granted to the General Ac-

counting Office under this bill. Mr. Sidney Cable says in his article referred to above, after discussing *U. S.* v. *Moorman*:

> The lack of authority of the Comptroller General's predecessor, the Comptroller of the Treasury, to reverse a determination of a contracting officer was clearly stated by the Supreme Court in another case in 1922 (*United States* v. *Mason & Hanger*, 260 U. S. 323 (1922)). There have also been a number of lower court decisions to the same effect (*Matthis Co.* v. *United States*, 79 F. Supp. 703 (D. N. J., 1948); *Zweig Co.* v. *United States*, 92 Ct. Cl. 472 (1941); *Carroll* v. *United States*, 76 Ct. Cl. 103 (1933); *Sun Shipbuilding Co.* v. *United States*, 76 Ct. Cl. 154 (1932); *Penn Bridge* v. *United States*, 59 Ct. Cl. 892 (1924); *Jas. Graham Mfg. Co.* v. *United States*, supra, note 26; *Leeds & Northrup Co.* v. *United States*, supra, note 25) over the years though the issue has not arisen very frequently.

The Comptroller General himself has recognized that his office does not now have such authority. He has stated:

> * * * It properly may be and in many instances is provided in contracts under certain circumstances that a designated official is authorized to determine particular facts, such a determination to be final and conclusive—in which event this office may not go behind such findings in the absence of fraud or bad faith (20 Comp. Gen. 573, 579 (1941)).

If additional support is desired, let me refer you to an article by Mr. Joseph B. Kennedy, Jr., who has had experience in legal work in the Army Quartermaster Corps. (Kennedy, The Conclusiveness of Administrative Findings in Disputes Arising Under Government Contracts, 4 Baylor Law Review, 160 (1952) at 176–179.)

I realize that the General Accounting Office may have expressed a somewhat different view of this controversial subject in discussing the present proposals, but in any event the proposed substitute bill would not seriously upset the status quo in this respect. We will doubtless continue to maintain a fair equilibrium in our friendly disagreements with the General Accounting Office.

An additional though minor complexity is introduced by the provision of the bill with respect to "reliable, probative, and substantial evidence." This may or may not add to the substance of the bill, since "grossly erroneous" may cover the situation, but in any event it introduces new and untried terms. The concept of "substantial evidence" is known in other fields of the law, for example, as to the finality of the findings of a judge or the verdict of a jury. But "reliable and probative evidence" is young and fancy free and only to be defined in subsequent litigation which should not be thus encouraged. Finally, the very looseness of the definition adds opportunity for arbitrary administrative action on the part of the General Accounting Office, or any other administrative agency which might be given the authority to review such administrative decisions. This point also is corrected in the proposed substitute bill.

As to section 2 of H. R. 1839, which would prohibit any provision in a Government contract making an administrative decision final on a question of law, it should be pointed out that this section would work a change in the present state of the law. (See *U. S.* v. *Moorman*, 338 U. S. 457, 70 S. St. 288, 94 L. Ed. 256 (1950); *U. S.* v. *John McShain Inc.*, 308 U. S. 512, 60 S. Ct. 134, 84 L. Ed. 437 (1939); Mulligan, *Disputes Clause of the Government Construction Contract: its Misconstruction*, 27 Notre Dame Lawyer 167 (1952), reprinted in Congressional Record, July 4, 1952, pp. 9518–9522 at 9519.) It should also be pointed out that this matter is in no way involved in

the Wunderlich decision, which this bill is designed to correct. We raise no objection, however, to this provision.

H. R. 6946 is, of course, identical with H. R. 1839 except that the words "General Accounting Office" have been omitted. Thus one of our major objections has been met. The other objections raised above to the terms of H. R. 1839 are still applicable.

We have no special objection to H. R. 3634 except that it would freeze the disputes procedure by statute, thus making it less flexible and less open to improvement as new conditions may arise. The constitutionality of the bill might be in some doubt, however, since a court might construe the bill if enacted as prescribing a rule of decision. That matter was discussed in *Pope* v. *United States* (323 U. S. 1.)

Finally, I should like to recommend for your consideration a very exhaustive and impartial discussion of the whole matter which came into my hands only 2 days ago, entitled "Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle over the Wunderlich Case," by Mr. Franklin M. Schultz, found in the December 1953 issue of the Harvard Law Review. With your permission, we shall very soon make available to the committee an adequate number of reprints of this article.

Mr. WILLIS. We have some.

Mr. FOLEY. Mr. Schultz is to be a witness here today.

Mr. HINES. Fine. I had heard that he was practicing down in Washington, and I hoped he could be here.

Finally, if legislation on this subject is felt necessary, we should favor the substitute bill proposed by the Comptroller General of the United States under date of December 30, 1953, or the amended bill, you might say, in place of H. R. 1839, and we should oppose H. R. 1839 in its present form. We should also oppose H. R. 6946 and, to a lesser degree, H. R. 3634.

The CHAIRMAN. Thank you, sir.

Mr. FOLEY. Mr. Louis F. Dahling.

STATEMENT OF LOUIS F. DAHLING, ASSOCIATE COUNSEL, AUTOMOBILE MANUFACTURERS ASSOCIATION

Mr. DAHLING. Mr. Chairman, my name is Louis F. Dahling. I am associate counsel for the Automobile Manufacturers Association. May I first express the appreciation of the officers and members of the association for the opportunity to appear at this meeting.

Prior to the adjournment of Congress this past summer, the committee held hearings on S. 24 and H. R. 1839, which was the House duplicate of S. 24, and on H. R. 3634. We requested and were granted permission to appear before the committee to voice our objections to the bills in the form presented, but Congress adjourned before we could be heard. Since Congress reconvened, H. R. 6946 has been introduced and referred to the committee, so presently all four bills are under consideration. The subject-matter of all of these bills is the so-called disputes clause which has for many years been found in Government contracts. We consider any legislation in this field to be of vital importance to the automotive industry with its many

Government contracts, and for that reason we again requested the privilege of appearing before the committee for the purpose of expressing our views on the proposed legislation.

The automotive industry, as you know, produced during World War II vast quantities of war supplies under contracts with the armed services. The association at the very beginning of that war in order to expedite production sponsored the formation of the Automotive Council for War Production, which included all members of the association, their suppliers, and many parts manufacturers. The total membership of the council was approximately 525. The automotive industry represented by the council produced 26 percent of the war products produced by the metal-working industries, and the total delivery of war materials for World War II by the industry was $29 billion. The automobile manufacturers and truck manufacturers were generally prime contractors, but they could not have performed their contracts without the assistance of many small suppliers. For example, 63 percent of the members of the council during the war employed less than 500 people. Under certain prime contracts, there would be literally hundreds of subcontractors in various tiers. It follows that any legislation involving the performance and payments under Government contracts affects many small suppliers and the small-business men as well as the large prime contractors.

Since the outbreak of the Korean hostilities, the members of the association are again all engaged in defense work under contracts with the armed services and, in turn, have entered into many subcontracts with their suppliers. These facts are mentioned merely to show that the association and its members have had considerable experience with Government contracts and with the disputes clause used in such contracts. It is not a new matter with us at all. We have lived with it and think we know something about it, and we know the importance of this legislation.

Government contracts have for many years, contained a disputes clause. The form widely used by the armed services with which the members of the Automobile Manufacturers Association have the majority of their contracts prior to 1952, read as follows. I have set the form forth in the statement, and I will not read it.

The purpose of the disputes procedure, of course, is to effectively, expeditiously, and with finality resolve the disputes and differences of opinion between contractors and the Government that are bound to arise from time to time during the performance of any contract so that the performance of the contract may proceed in an orderly fashion.

Since 1878 the Supreme Court has consistently upheld the validity of disputes clauses. The decision of the contracting officer or the head of the department under such a clause has been repeatedly held to be conclusive unless impeached on ground of fraud or such gross mistake as necessarily implied bad faith.

In June of 1950, the Court of Claims handed down an opinion in the case of *Wunderlich* v. *U. S.* I will not take the time of the committee to discuss that opinion. It has been dissected here by a number of people.

I subscribe fully with Mr. Gaskins' statement with respect to the case and the effect of that particular case. I think it does restrict the rights which contractors had before the case was decided. Of course,

after the decision in the case, interested parties, and very properly I think, immediately insisted that the rule of law laid down in that case should be modified. The Defense Department, in an effort to reinstate the claimed pre-Wunderlich status of the law, amended its disputes clause in 1952 to permit review by the courts of a contracting officer's decision which are found to be "fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith," and we understand that General Services Administration has similarly amended its disputes clause.

These bills were then introduced in Congress, including S. 24 and the bills now before this committee at the present time.

We felt frankly at one time that no legislation was necessary on this subject. This position was taken because the Defense Department had amended its disputes clause, as indicated above, and because of the satisfactory appeal procedure which was afforded by the review boards established to effect the provisions of the Defense Department disputes clause. However, we now realize that the present disputes clause, of course, is not necessarily permanent and may be abandoned at any time. It also appears there is no uniformity of appeal procedure among the Government agencies. Some of them do not permit a full review and opportunity to present or examine witnesses, and we now feel frankly that legislation is necessary to afford uniform and adequate protection for all Government contractors.

We have examined the bills, and we consider that there is at least one serious objection to both S. 24 and H. R. 1839. This objection that we have in mind has been suggested by other witnesses appearing before the committee. As we read those bills, they purport to make the General Accounting Office another Court of Claims. They provide that the disputes provision of the Government contract shall be void with respect to any decision of a contracting officer "which the General Accounting Office or a court having jurisdiction finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative and substantial evidence." Now, it does not appear from the language in that bill that there would be any appeal from a decision of the General Accounting Office, and that office will in all probability make the first review of any disputes clause decision. If that agency should decide that the decision was not supported by substantial evidence, it would appear that the contractor would have no redress. Furthermore, the General Accounting Office is a part of the legislative department of the Government. It has aptly been called the watchdog of Congress and is supposed to prevent improper expenditures of Government funds. If this agency is made another Court of Claims, in a sense it becomes a judge and jury and a prosecutor.

It is submitted that an agency of the legislative department with duties and obligations of the General Accounting Office should not be placed in such a position. It is not in a position impartially to judge these matters.

Now, without going into the other bills, it is our understanding that none of the bills now before the committee is satisfactory to all parties interested, and that is perfectly apparent from the discussions to date. We further understand that because of this divergence of opinion representatives of industry and the Government, or certain representa-

tives of industry, I will say, and the Government, conferred subsequent to the summer adjournment for the purpose of exploring the possibility of finding some common ground upon which all could agree, and the result was a proposed substitute bill which was set forth in the letter dated December 30, 1953, from the Comptroller General to Chairman Reed, which has been introduced and is part of the record of this particular hearing.

The proposed substitute bill does not grant judicial power to the General Accounting Office. It is our understanding in listening to the representative of the General Accounting Office, Mr. Fisher, that that office has no objection to this bill. The bill, in our opinion, also very effectively and clearly establishes the law as it existed prior to the Wunderlich case, by providing that no decision of a contracting officer shall be final if fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, which as I understand it was the pre-Wunderlich law. In addition, this bill provides that the decision must also be supported by substantial evidence. In other words, it does, as I view it, go beyond the pre-Wunderlich case, but I have no particular objection to that.

Because of the necessity for such legislation, and because this bill seems to cover the situation, we would recommend favorable consideration. Now, we are not by making that recommendation stating that we are opposed to the American Bar Association approach to this matter. If this was the opening of the hearings on this particular bill, we probably would take the position that it was a piecemeal attack on a broader problem, and that the entire question of termination of contracts should be treated and that this should only be a part of that. But in view of the apparent urgency of this type of legislation at the present time, we feel that the results could be best accomplished by the committee favorably considering the substitute bill as an amendment to S. 24 or H. R. 1839, or as a substitute bill.

I again appreciate being afforded the opportunity to appear, and if there are any questions I will be happy to try to answer them.

(The prepared statement of Mr. Dahling follows:)

STATEMENT OF LOUIS F. DAHLING, ASSOCIATE COUNSEL FOR AUTOMOBILE MANUFACTURERS ASSOCIATION

Mr. Chairman, my name is Louis F. Dahling. I am associate counsel for the Automobile Manufacturers Association. May I first express the appreciation of the officers and members of the association for the opportunity to appear at this meeting.

Prior to the adjournment of Congress this past summer, the committee held hearings on S. 24 and H. R. 1839 (which was the House duplicate of S. 24) and on H. R. 3634. We requested and were granted permission to appear before the committee to voice our objections to the bills in the form presented, but Congress adjourned before we could be heard. Since Congress reconvened, H. R. 6946 has been introduced and referred to the committee, so presently all five bills are under consideration. The subject matter of all of these bills is the so-called disputes clause which has for many years been found in Government contracts. We consider any legislation in this field to be of vital importance to the automotive industry with its many Government contracts, and for that reason we again requested the privilege of appearing before the committee for the purpose of expressing our views on the proposed legislation.

The automotive industry, as you know, produced during World War II vast quantities of war supplies under contracts with the armed services. The association at the beginning of that war in order to expedite production sponsored the formation of the Automotive Council for War Production, which included

all members of the association, their suppliers, and many parts manufacturers. The total membership of the council was approximately 525. The automotive industry represented by the council produced 26 percent of the war products produced by the metal working industries, and the total deliveries of war materials for World War II by the industry was $29 billion. The automobile manufacturers were generally prime contractors, but they could not have performed their contracts without the assistance of many small suppliers. For example, 63 percent of the members of the council during the war employed less than 500 people. Under certain prime contracts, there would be literally hundreds of subcontractors in various tiers. It follows that any legislation involving the performance and payments under Government contracts affects many small suppliers and the small business men as well as the large prime contractors.

Since the outbreak of the Korean hostilities, the members of the association are again all engaged in defense work under contracts with the armed services and, in turn, have entered into many subcontracts with their suppliers. These facts are mentioned merely to show that the association, its staff, and its members have had considerable experience with Government contracts and with the disputes clause used in such contracts.

Government contracts have for many years contained a disputes clause. The form widely used by the armed services, with which the members of the Automobile Manufacturers Association have the majority of their contracts prior to 1952, read as follows:

"Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the contracting officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the contractor. Within 30 days from the date of receipt of such copy, the contractor may appeal by mailing or otherwise furnishing to the contracting officer a written appeal addressed to the Secretary and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive; provided that, if no such appeal is taken, the decision of the contracting officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the contractor shall proceed diligently with the performance of the contract and in accordance with the contracting officer's decision."

The purpose of the disputes procedure, of course, is to effectively, expediously, and with finality, resolve the disputes and differences of opinion between contractors and the Government that are bound to arise from time to time during the performance of any contract so that the performance of the contract may proceed in an orderly fashion.

Since 1878, the Supreme Court has consistently upheld the validity of disputes clauses. The decision of the contracting officer or the head of the department under such a clause has been repeatedly held to be conclusive unless impeached on ground of fraud or such gross mistake as necessarily implied bad faith.

In June of 1950, the Court of Claims handed down an opinion in the case of *Wunderlich* v. *U. S.* (117 C. Cl's 92). This case involved a contract with the Government for the construction of a dam in southern Colorado. The Court of Claims held the decision of the contracting officer under the disputes clause in the contract in connection with certain claims for extra work not covered by the specifications to be arbitrary and capricious and allowed the plaintiff to recover. The court cited in support of its holding the case of *United States* v. *Moorman* (338 U. S. 457 (1950)), wherein the Supreme Court had held that the disputes clause would be enforced in absence of fraud or such gross mistake as would necessarily imply bad faith.

The Government appealed (*U. S.* v. *Wunderlich*, 342 U. S. 98) and the majority of the Supreme Court, speaking through Justice Minton, reversed the Court of Claims and stated that contracts, both Government and private, had been before the Court in which provisions equivalent to the disputes clause in question had been approved and enforced; that the Supreme Court had consistently upheld the finality of the Department head's decision "unless it was founded on fraud, alleged and proved," and further stated that "fraud" meant "conscious wrongdoing and intention to cheat or be dishonest." Justice Douglas, with whom Justice Reed concurred, dissented. He criticized the rule laid down by the majority and said it would have a wide application and a devastating effect; that: "It makes a tyrant out of every contracting officer. He is granted the power

of a tyrant even though he is stubborn, perverse or captious," and "makes Government oppressive." Justice Jackson dissented on the ground that the majority opinion gave "an exceedingly rigid meaning to the word fraud" and impliedly overruled the decision in the Moorman case, where the Court had held as noted above that decisions of the contracting officer were "conclusive, unless impeached on the ground of fraud, or *such gross mistake as necessarily implied fraud.*" (Emphasis was supplied by Justice Jackson.)

Interested parties immediately very properly insisted that the Wunderlich case had modified the existing law to the detriment of Government contractors and that something should be done about it.

The Defense Department, in an effort to reinstate the claimed pre-Wunderlich status of the law, amended its disputes clause in 1952 to permit review by the courts of a contracting officer's decisions which are found to be "fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith" and we understand that General Services have similarly amended its disputes clause.

Bills were also introduced in Congress, of which S. 24 is one. This bill was approved by the Senate Judiciary Committee on February 4, 1953, and adopted on June 8, 1953. H. R. 1839, identical in content with S. 24, was introduced in the House on January 16, 1953, and H. R. 3634 was introduced on March 3, 1953. As noted above, H. R. 6946 was introduced at this second session on January 6, 1954.

We felt at one time that no legislation on the subject matter of the disputes clause was necessary. This position was taken because the Defense Department has amended its disputes clause, as mentioned above, and because of the satisfactory appeal procedure afforded by the review boards established to effect the provisions of the disputes clause. However, the present disputes clause used by the armed services is not necessarily permanent; it may be amended or abandoned at any time. It also appears that there is no uniformity of appeal procedure among the Government agencies and that some of them do not permit a full review with the opportunity to present and cross-examine witnesses. We now feel, therefore, that legislation is necessary to afford uniform and adequate protection to all Government contractors.

We have what we consider to be very serious objections to S. 24 and H. R. 1839. These bills purport to make the General Accounting Office another court of claims. They provide that the disputes provision in the Government contract shall be void with respect to any decision of a contracting officer "which the General Accounting Office or a court having jurisdiction finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative and substantial evidence." (Italics supplied.) Furthermore, it would seem that there would be no right of appeal from the decisions of the GAO.

This agency will in all probability make the first review of a disputes clause decision. If that agency should decide that the decision was not supported by substantial evidence, the contractor would have no redress.

The General Accounting Office is a part of the legislative department of the Government. It has aptly been called the "watchdog of Congress" and is supposed to prevent improper expenditures of Government funds. If the GAO is made another court of claims, it becomes the judge, jury, and prosecutor. It is submitted that an agency of the legislative department with the duties and obligations of the General Accounting Office should not be placed in such a position.

We understand that none of the bills now before the committee is satisfactory to all the parties interested in this legislation. Because of this divergence of opinion, representatives of industry and Government conferred subsequent to the summer adjournment for the purpose of exploring the possibility of finding some common ground upon which all could agree, and the result was a proposed substitute bill which is set forth in the letter, dated December 30, 1953, from the Comptroller General to Chairman Reed.

The proposed substitute bill does not grant judicial power to the GAO. This bill, in our opinion, also very effectively and clearly reestablishes the law as it existed prior to the Wunderlich case by providing that no decision of a contracting officer shall be final if "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith," and, in addition, provides that the decision must be supported by "substantial evidence."

We recommend, therefore, that favorable consideration be given this substitute bill.

Mr. FOLEY. Mr. Kline.

STATEMENT OF ROBERT E. KLINE, JR., REPRESENTING THE NATIONAL ASSOCIATION OF RIVER AND HARBOR CONTRACTORS

Mr. KLINE. I am Robert E. Kline, Jr., an attorney with offices in Washington, D. C. I am appearing on behalf of the National Association of River and Harbor Contractors in support of the legislation that is receiving your consideration today, designed to give relief from the unfortunate consequences of the Wunderlich decision.

The national association that I represent, as its name implies, is composed of all the principal dredging and harbor contractors engaged in river and harbor work throughout the United States. These companies are located on both the Atlantic and Pacific coasts, on the Gulf and the Great Lakes, and in far-off Hawaii.

Most of the companies in our organization have been in business a long, long time. I feel confident that one or more of them have participated in every important dredging job, or dredging and fill job, that has been undertaken in this country during the past 50 years. And their work has spread out all over the world; the late war found them in Europe and in Africa, in Australia and the far islands of the Pacific, as well as nearer home in North and South America, the Caribbean, et cetera, helping build the necessary bulwarks of defense-dredging harbors, constructing bases, airfields and docks, and so on. In peacetime, of course, they are engaged in the more normal activities of constructing safe and adequate harbors, dredging rivers, building dikes, levees and breakwaters, et cetera, usually under municipal, State or Federal supervision. When work has not been too abundant at home, they have sought it abroad; some of them are now engaged in important dredging and river and harbor work for our friendly neighbors to the south; others are doing jobs in Europe and the Far East. I am therefore speaking for an industry that is important at all times. I am sure you appreciate that it becomes a vital part of any war effort.

A large part of our river and harbor dredging, filling, and other construction work has been performed under Army and Navy contracts, or contracts with other Government departments and agencies. Required to be included in all such contracts is the so-called dispute or finality clause, which provided, until its recent amendment which I shall discuss later, that—

> all disputes concerning questions of fact * * * shall be decided by the contracting officer subject to written appeal * * * to the head of the department * * * whose decision shall be final * * *.

Despite this so-called finality clause, the courts had sought to do justice. They asserted that they could not be deprived by contract or otherwise of their normal jurisdiction to decide questions of law. They went further to say that, if the decision of the contracting officer or department head were arbitrary, capricious, or grossly erroneous, it would be disregarded and set aside in an appropriate court proceeding for damages or some other form of judicial relief. There had thus been created a sort of judicial safety valve that was sometimes needed and used to correct administrative abuse.

In fairness it should be said that in our experience incidents of such abuse have not been frequent. Generally speaking, members of our association have gotten along very well with the Army and Navy

engineers and other officials who have been designated as contracting officers on the many important river and harbor projects that we have undertaken for the Government throughout the years. We have formed a high regard for their ability and fairness, and they have come to rely upon our experience and know-how in our particular field of endeavor.

Once in a while, however, the human equation being what it is, we have come across persons in responsible positions who have not been fair and reasonable. Unfortunately, certain contracting officers have proven to be arbitrary, or perverse, or sometimes just plain incompetent. Incidents of this kind are exceptional, but they do occur; and it goes without saying that when officers of this caliber unfortunately do get in control of things, abuses occur from which there should be some kind of judicial relief, regardless of the presence in the contract of a finality clause.

As I have said, the principles governing judicial review had been pretty well worked out in the courts, when along came the now famous Wunderlich decision. Disregarding all that had gone on before, the Supreme Court imposed a far more rigid test for judicial review of factual determinations under the "disputes" clause than had ever been conceived before. It said in effect that, because of the presence of article 15 in the contract, the decision of the contracting officer or department head was absolutely final on disputes concerning questions of fact, and the only exception was where the aggrieved party could allege and prove actual fraud—and by fraud it meant "conscious wrongdoing, and intention to cheat or be dishonest."

This decision came as a thunderbolt to our industry, as I am sure it did to all those engaged in the performance of Government contracts. Because of the required inclusion of article 15 in all construction contracts, was there to be no escape from unjust or arbitrary action on the part of contracting officers or department heads?

Actual fraud is difficult, if not impossible, to prove. In fact, it seldom occurs. But you do sometimes meet stubbornness and perverseness, a determination to stick to an original wrong viewpoint, regardless. And there have been some unfortunate instances of incompetence and neglect. A recurrence of any of these could result in serious administrative abuse, for which there would be no remedy under the Wunderlich decision, except for actual fraud.

We immediately set about to get some legislative relief from the harsh consequences of the Wunderlich decision. As you know, bills were introduced in the last Congress on both sides of the Capitol; hearings were held; one of the bills, S. 2487, passed the Senate, but failed of enactment by the House because of the shortness of time before adjournment. Accordingly, this remedial legislation had to be reintroduced in the present Congress. The Senate bill, S. 24, again passed the Senate, and is now before you for your consideration, together with three House bills, all having the same objective, but covering the subject in somewhat different ways.

In the meantime two things have occurred, which we feel have been steps in the right direction, but in our opinion are not adequate to take care of the situation.

First, Congress, in the Department of Defense Appropriation Act for fiscal 1953, provided:

No funds contained in this Act shall be used for the purpose of entering into contracts containing article 15 of the Standard Government Contract unless and until said article is revised and amended to provide an appeal by the contractor to the Court of Claims within ninety days of the date of decision by the department concerned, authority for which appeal is hereby granted.

This provision was repeated in the Defense Appropriation Act for fiscal 1954.

While probably of some help to others, this provision is too limited in its scope and tenure to afford a permanent and adequate remedy from the effects of the Wunderlich decision. It applies only to construction contracts under these particular appropriation acts, which cover the military functions of the Department of Defense. They do not cover the civil functions of that department; these are carried in a separate act containing no such provision. So far as we dredging contractors are concerned, our business with the Defense Department falls under its civil functions, and so we are not protected by this provision.

The second thing the Government did was to revise its standard "disputes" clause. I will not quote the clause because it was quoted several times before.

We feel this definitely is an improvement. In an indirect sort of way, it contemplates bases in addition to fraud for judicial review of the department head's final determination, by providing that his decision shall be final "unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith."

But one difficulty is that this change results from administrative action, not statutory requirement, and the clause could be changed again, at will, by the same administrative authority. There is no assurance of its permanence.

Neither does this clause as revised give all the bases for judicial relief that are proposed by the bills now before you. S. 24, for example, as it passed the Senate, has as an additional ground a decision "not supported by reliable, probative, and substantial evidence." So too H. R. 1839, which is like S. 24, and also H. R. 6946.

These bills also make it clear that no Government contract shall contain a provision making final on a question of law the decision of an administrative official, representative, or board. That I think is proper and states the law as it now is so far as jurisdiction of courts is concerned.

Like some of those who have spoken before me, I am disturbed by the mention of the General Accounting Office in the Senate bill. It is also mentioned in H. R. 1839. I think it has no place there. I get reassurance from the Senate report, which states that this language is not intended to add or subtract from the present jurisdiction of the GAO in any way. As you know, the precise extent and limits of the Comptroller General's jurisdiction is presently a matter of great concern and open dispute. I do not think that that involved question should be injected here. It would only lead to confusion and would divert attention from the prime purposes of this remedial legislation to afford legislative relief from the unfortunate effects of the Wunderlich decision.

In conclusion, I am authorized to express the support of the National Association of River and Harbor Contractors for S. 24, and to urge your approval of this Senate bill, or of some other bill having substantially the same purpose and effect.

Mr. FOLEY. Mr. McDaniel.

STATEMENT OF CHARLES MAECHLING, JR., REPRESENTING THE RADIO-ELECTRONICS-TELEVISION MANUFACTURERS ASSOCIATION

Mr. MAECHLING. Mr. Chairman, my name is Charles Maechling, Jr. I am testifying in the absence of the president of our association, the Radio-Electronics-Television Manufacturers Association.

Our association is composed of 360 radio, electronics, and television manufacturers, including a large proportion of the Nation's suppliers of military electronic equipment. Our industry has a vital interest in legislation affecting the terms and conditions under which defense contractors do business with the Government. We are most appreciative of this opportunity to present our views.

For the past few years our industry has sold about $2.5 billion worth of equipment to the military services annually. We enjoy a very satisfactory business relationship with the armed services. We hope that Congress will do nothing to disturb this relationship in the field of contract arbitration without giving close consideration to the views of industry generally.

On January 19 our president sent a letter to this committee, which I quote in pertinent part as follows:

> This association is fully aware of the unhappy consequences of the Wunderlich decision despite the fact that the decision's impact on defense contractors in our industry has been neutralized by the adoption of the September 15, 1952, amendment to the armed services procurement regulations disputes clause. Nevertheless, we intended to testify in opposition to S. 24 because, in our opinion, that bill went beyond mere restoration of the pre-Wunderlich rule. It introduced new elements into the review of disputes decisions which have seriously jeopardized finality of settlement and it raised questions on the adequacy of existing review procedures which could only be answered by the courts. We have been informed by the Comptroller General, however, that he has recommended to your committee that new language reconciling the differing views of defense manufacturers, the construction industry, the General Accounting Office and the Department of Defense, on the best means of counteracting the Wunderlich decision, be substituted in place of S. 24. We have studied the substitute language proposed by the Comptroller General, and it appears to us to satisfactorily restore the pre-Wunderlich rule without containing the features which we objected to in S. 24.

I should like to make a few remarks in amplification of the reasons given in Mr. McDaniel's letter for our opposition to the enactment of S. 24 and our preference for the enactment of the bill enclosed in the Comptroller General's letter of December 30, 1953, to the chairman of this committee.

If legislation is enacted, we favor a bill which would restore to the Comptroller General, to contractors, and to courts the respective status, rights, and powers which they enjoyed prior to the Wunderlich decision. We believe that the bill proposed in the Comptroller General's letter would accomplish such a restoration. We further believe that after such legislation the Comptroller General could exercise his

powers under the Budget and Accounting Act of 1921 in the same manner and to the same extent as he was able to do prior to the Wunderlich decision. In fact, the Comptroller General's letter to the chairman of this committee so states. On the other hand, S. 24, instead of limiting itself to restoring the pre-Wunderlich situation for contractors, the Comptroller General, and the courts, introduces substantial departures from established procedures and raises new questions of interpretation which ultimately would have to be settled by expensive and protracted litigation.

The language of S. 24 apparently establishes the General Accounting Office as an additional administrative agency for the review of disputes under Government contracts. This innovation would have a serious impact on existing procedures for arbitrating such disputes and giving the requisite degree of finality to decisions thereunder. Over the years the contracting agencies of the Government with which the electronics industry does almost all of its business, namely, the Department of Defense, the Atomic Energy Commission, and the GSA, have developed efficient and workable systems for arbitrating disputes and reaching decisions on questions of fact. Procedures have been devised for insuring that contractors are given a fair and impartial review of adverse decisions by contracting officers. Boards of contract appeal have been established, such as the Armed Services Board of Contract Appeals and the boards of some of the civilian agencies. Clear and effective procedures have been devised for appealing decisions of these boards under certain conditions to the courts. Under S. 24, however, the scope and powers of the General Accounting Office are vastly enlarged, and this agency of the Government, which has heretofore exercised principally investigatory and audit functions, becomes clothed with powers of a judicial nature. S. 24 appears to set up the General Accounting Office as a third administrative tier of review in Government contract disputes.

Now, it is not clear from the bill whether this authority is mandatory or whether it can be exercised at the discretion of the Comptroller General, nor is it clear whether this is an administrative review or a quasi-judicial type of review, substituting an administrative agency for the courts, without affording a litigant the customary protection which is given to him in judicial proceedings. Moreover, we raise the question whether the decisions by this additional agency of review are final or whether they in turn can be appealed to the courts. If the latter, the bill is defective in that it fails to set forth the conditions under which a judicial appeal can be taken and the procedure for doing so.

In addition, it would appear that the General Accounting Office would be both judge and jury in instances where it is called upon to review actions derived from the authority which is granted to it by the Budget and Accounting Act of 1921. Thus, a situation could arise where the General Accounting Office first stops payment under its investigatory and audit power and then reviews its own actions in so doing. Unless the authority which S. 24 proposes to give to the General Accounting Office is spelled out in much greater detail, we can foresee infinite possibilities of confusion.

One thing especially seems clear, and that is that the finality now afforded the decisions by Government boards of contract appeals, and in particular the Armed Services Board of Contract Appeals, would

be utterly nullified by the establishment of a new administrative agency of review, and the usefulness of these boards would come to a quick end. The Department of Defense in its testimony has corroborated our prediction in this regard.

These are the reasons why the language of S. 24, as compared with the language of the bill proposed by the Comptroller General, seems to us to be fraught with ambiguity and danger. We accordingly wish to advise this committee that we concur in the recommendation of the Comptroller General that the bill which he forwarded to the chairman in his letter of December 30, 1953, be substituted for S. 24 or H. R. 1839 and in that form enacted into law. In our view, the adoption of this language will rectify the unfortunate situation created by the Wunderlich decision, without disrupting finality of settlement and without disrupting the present appellate procedures provided by the Government boards of contract appeals.

The CHAIRMAN. Thank you.

Mr. FOLEY. Mr. Gaskins.

FURTHER STATEMENT OF JOHN W. GASKINS, ATTORNEY, WASHINGTON, D. C.

Mr. FOLEY. Mr. Gaskins, an amendment has been suggested to the committee to section 2 of S. 24 and applicable to H. R. 1839 and H. R. 6946, as follows: Strike out the period after the word "board" and insert the following:

or contractually limiting any said decision to determinations of questions of fact.

Would you mind giving the subcommittee your views on that proposal?

Mr. GASKINS. Mr. Foley, I think that addition was proposed for the bill that has been suggested by the Comptroller General in his letter of December 30 to the committee, and I have previously stated that I think that bill is the best bill which is presently before the committee. However, I think the addition of the clause which you mentioned would possibly have the effect of ruling out altogether the inclusion of disputes clauses relating to questions of fact in Government contracts, and if it had that effect I do not believe that there has been any advocate for that up to the present time.

Mr. FOLEY. Thank you.

Mr. Franklin Schultz.

The CHAIRMAN. I might say to those witnesses who are present that at the conclusion of the gentleman who is before us the committee will recess for an hour and a half.

STATEMENT OF FRANKLIN M. SCHULTZ, ATTORNEY AT LAW, WASHINGTON, D. C.

Mr. SCHULTZ. Mr. Chairman, I appreciate this opportunity to appear before your committee to speak briefly about the pending bills dealing with the review of Government contract disputes.

I was until last fall a professor of law at the Indiana University School of Law. I am now an attorney in practice in Washington. While in Indiana I taught the general contracts courses and a number

of commercial law courses over a period of 6 years, and have done some research and writing in the contract area with particular reference to construction and procurement contracts. About a year and a half ago I became interested in the problem created by the Wunderlich decision. I have followed the legislation fairly closely since the Senate hearings in the spring of 1952. As I did not have to teach last summer, I spent the time researching this problem and stated my views in an article in the Harvard Law Review which came out last December.

I should like to say that I am making this statement as a private citizen and as a student of this area, rather than as an attorney for any person, corporation, or association.

I have a prepared statement. However, it was prepared before I had the benefit of this hearing, and with your kind permission I should like to speak informally because, as a matter of fact, I have changed my views somewhat. I have been educated you might say, by having sat in this hearing the last 2 days.

You may, I think, be interested in hearing very briefly what I consider to be the repercussions of the Wunderlich decision. I should say, first of all, that I think there is a practical need for legislation. I agree with Congressman Walter who yesterday pointed out that no matter what position the Department of Justice may take on what the Wunderlich opinion meant, as a practical matter the Court of Claims is construing it to mean an absolute fraud rule, and despite the fact that several administrative agencies have amended their disputes clause, that amendment has not been made across the board. Furthermore, as was pointed out I believe by Representative Celler, there is no guaranty that these amendments would hold for the future.

One minor point. No one as far as I know has mentioned a rider to the Department of Defense Appropriation Acts of 1953 and 1954, a section 635, which I refer to on page 3 of my statement. I realize it is not within the province of this committee. However, it does seem to me that if the Congress does pass appropriate legislation, this confusing rider should be deleted from the next appropriations bill for the Department of Defense, because no one is sure what it means, not even the Department of Defense, and it could throw the Court of Claims into a state of confusion if some cases are appealed to the Court of Claims on the basis of this rider.

Now, from the standpoint of a contractor, if we were going to approach this problem afresh, I think most of them would prefer some form of commercial arbitration as you have in private contracts; that is to say, there, where you have a dispute the parties have agreed in advance that the architect will settle it, and if they do not like his decision they can appeal to an impartial panel which is selected by the American Institute of Architects, which will make the final decision. It is also true that in the private contract world you do have the appointment of what you call third party experts, an architect, engineer, or supervising expert, whose word is final on questions of interpretation, fact, and so forth. As a matter of fact, in reading the Supreme Court cases it is interesting that the Supreme Court has never distinguished between a private contract which makes use of a third party expert, such as an architect, and a Government contract which makes use of a contracting officer as the third party arbiter. I think

that this is unfortunate, because in private contracts your third party expert, the architect or engineer, is freely appointed, freely chosen by both parties to the contract. They put their confidence in him, and consequently if he makes a decision they are willing to abide by it; whereas, in the case of Government contracts, as we were made well aware by Congressman Celler's comment yesterday, the contracting officer is appointed only by the Government, without the consent of the private contractor, and the disputes clause is written by the Government as a standardized provision, the private contractor having no opportunity to negotiate whether or not it should be included in the standard contract.

If, as I say, we were starting afresh, I would suggest that this committee might explore the possibility of using some form of arbitration in the field as a way of settling disputes in construction and other types of contracts. However, it appears that as of this date the Government has never been willing to accept compulsory arbitration, and in the few cases where discretionary arbitration has been attempted, as under the Contract Settlement Act, for example, it has never been widely used.

The Government, of course, takes the position that it needs this disputes machinery to get its work done efficiently and expeditiously, and I think there is a great deal to be said for that point. They acknowledge the fact that it is a one-sided proposition, and they say that the remedy or the counteracting power, you might say, is the existence of an appeal board, an administrative appeal board, within the procurement agency. The Armed Services Board of Contract Appeals, as far as I have been able to study it, does offer a de novo review, a fair hearing, and does give the contractor an opportunity to present his case. As Mr. Gaskins pointed out this morning, however, this administrative review is not available in that form in other procurement agencies. There are other boards, but I do not think that they approximate the procedure which is provided by the Armed Services Board of Contract Appeals. I do think that that Board and the others could be strengthened. I think their procedures could be brought in closer approximation with the Administrative Procedure Act, which the Congress passed in 1946. I think that their independence could be strengthened by having their members appointed not by the individual secretary of the service concerned but by the Secretary of Defense, so they would not be on the payroll of the agency for whom they are making the decision.

Now to come to the bills which are pending. First, as for H. R. 1839, which is the companion bill to Senator McCarran's S. 24, I should like to say this: While it purports to favor the private contractor—and certainly that is the impetus for all this proposed legislation, to overcome the restrictive effects of the Wunderlich decision—it seems to me that it acts as a boomerang. I say that because of the phrase in H. R. 1839 which gives the General Accounting Office the power to upset a contracting officer's decision which is favorable to the private contractor if the General Accounting Office decides that there is not substantial evidence to support that decision. Now, I think the General Accounting Office has a legitimate concern about the impact of the Wunderlich case. I do not think there is any question but that the Wunderlich case has narrowed the opportunity the

General Accounting Office has to upset a contracting officer's decision which they feel is perhaps not fraudulent but so grossly erroneous as necessarily to imply bad faith. I must say that in my research I never found a case where the General Accounting Office was successful in court in proving that its own officer, that is, the Government's officer, had been fraudulent against the Government in deciding or making a decision under the disputes clause. There may be cases. I am speaking now of cases where a contracting officer has made an award or has said that payment shall be made to the contractor for a change or something of that sort, and it has been approved by the department head or the representative of the board of contract appeals and the GAO has refused payment. In those cases where the private contractor is wealthy enough to continue litigation, he can go into the Court of Claims and bring his action, and I know of no case where the Court of Claims has upheld the GAO, even though presumably the GAO, as the law was interpreted before Wunderlich, if it were to prove fraud or such gross mistake that is tantamount to fraud, would be able to upset the Government's officer.

I think I can illustrate rather dramatically and briefly what might happen if the GAO were left in the picture by giving this simple example. Take General Motors, which as I understand it has a large number of cost-plus contracts. Let us suppose that they have a contract to make a new style tank. They need special tools which cost thousands of dollars. So before they set up the machinery to manufacture the tools they go to the chief contracting officer and they say, "We have this proposal. Will you approve it?" This is the proposal for setting up the machinery for tooling up for these new tanks. The chief contracting officer reviews it, has his subordinates review it, and he finally approves. Then the contractor, be it General Motors or any other automobile manufacturer, goes to the bank and says, "We would like to borrow some money on this plant," and they show the approval of the chief contracting officer, and they assign their contract as collateral to the bank for money. The bank loans money which the manufacturer uses to set up the tooling, and then after vouchers are presented to GAO, let us say the GAO decides after careful review not to pay because they do not think that the chief contracting officer who approved the plan for tooling was supported by substantial evidence, to take the words of the McCarran bill, in his decision. Where is the bank? Well, obviously they are holding the bag, because the contracts which were deposited as collateral with them are of no value if the contractor cannot collect the money from the GAO to meet the payments to the bank. So I should think that banks and surety companies writing performance and payment bonds and other financial interests would be quite concerned about this inclusion of the GAO in the McCarran bill.

It does seem to me, incidentally, that the GAO has a real concern about the quality of our contracting officers, but I think the remedy lies in improving the contracting officers, getting better people, better qualified, more responsible people, rather than in setting up another Court of Claims. There has been considerable comment about the Comptroller General's proposed amendment. That is the bill which the last gentleman discussed. I do think it is an improvement over the McCarran bill. However, I have some doubt about the language.

As I read the language of the Comptroller General's bill it does not say specifically that an appeal can be taken by an aggrieved contractor. It says that—

no provision of any contract entered into by the United States relating to the finality or conclusiveness of any decision of the head of any department or his duly authorized representative or board in a dispute involving a question arising under such contract shall be pleaded—

it does not say by whom—

as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged.

And it says:

Provided, however, That any such decision shall be final and conclusive—

but it does not say against whom—

unless the same is found to be fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence.

Mr. HYDE. Does that not necessarily include both parties?

Mr. SCHULTZ. Yes, and that is exactly my point. I should think, unless the legislative history is clear, that several years from now, if the Comptroller General decides, as in my tank case, that a contracting officer's decision is not supported by substantial evidence, he could refuse payment, and in a court action he could say that this bill means that it is a two-way street, not only may the contractor upset the contracting officer for not having substantial evidence behind the decision, but in the case where the contracting officer makes a decision favorable to the contractor the GAO has similar upsetting power. I am bothered because Mr. Fisher in his testimony yesterday said this:

The enactment of a bill in either form—

meaning S. 24 or the Comptroller General's modified bill—

would permit administrative officers to make determinations on questions of fact which would have final effect if the decision was not found by the General Accounting Office or the courts to be arbitrary, capricious, etc. Such a law not only would protect the contractor from fraudulent, arbitrary, capricious action by giving him in addition to resort to the courts a further administrative remedy before the General Accounting Office, a timesaving and less expensive proceeding, but also would provide a protection through the General Accounting Office against decisions adverse to the interests of the United States. Certainly the rights of contractors and the Government to review or appeal should be coextensive.

I take that to mean that the GAO would have the same right under this modified bill to upset a contracting officer for lack of substantial evidence as would a private contractor. Incidentally, I think that might also raise a constitutional question.

Mr. WILLIS. I do not know that I follow your last point. What danger do you anticipate?

Mr. SCHULTZ. The danger I anticipate is that the GAO may rely on the wording of this bill and the legislative history to permit it to reverse for lack of substantial evidence, a contracting officer who has made a decision favorable to the contractor, permitting him to go ahead with tooling up his tanks.

Mr. WILLIS. This judicial review referred to in that passage there referring to a review by GAO, when GAO has been left out deliberately as compared to S. 24?

Mr. SCHULTZ. Well, that is persuasive, sir, but you do have the testimony of Mr. Fisher, sponsoring this modified bill, which would be part of the legislative history, saying that the rights of contractors and the Government to appeal should be coextensive. "Coextensive" is the word.

Mr. FOLEY. Prior to the Wunderlich decision could GAO refuse to pay on that same basis?

Mr. SCHULTZ. No.

Mr. FOLEY. Why not?

Mr. SCHULTZ. Because under the cases prior to the Wunderlich decision, as I read them, the GAO could only reverse the Government's contracting officer if that officer acted fraudulently or was so grossly erroneous as necessarily to imply bad faith.

Mr. FOLEY. That is the Wunderlich decision, is it not?

Mr. SCHULTZ. No. The Wunderlich decision, I believe, limits it to fraud, Mr. Foley.

Mr. FOLEY. So that the Government could not go in except on those conditions which you have just stated. Have they ever tried to go in? Does your research show that?

Mr. SCHULTZ. Yes, it shows that in 1922 there was a Supreme Court case, *Mason and Hangar* v. *United States*, where the Supreme Court said to the GAO:

> You cannot upset this contracting officer's decision.

It was a case where the contractor had approved the premium on an insurance policy as being a proper extra for the contractor, and the GAO refused payment. The contractor went into the Court of Claims and sued, and the Supreme Court said:

> You cannot upset this contracting officer's decision unless you can prove it fraudulent or so grossly erroneous as to necessarily imply bad faith.

Then from 1922 to 1952 in the Court of Claims there is a line of cases which is quoted in an article by Professor Robert Brancher written in the summer of 1952 issue of Law and Contemporary Problems, where the Court of Claims cited this 1922 Supreme Court decision and consistently refused to permit the GAO to upset the Government's contracting officer because the GAO had failed to prove that the officer acted fraudulently against the Government or that his action against the Government was so grossly erroneous as to imply bad faith.

Mr. FOLEY. But at the same time the Court of Claims was permitting recovery on the part of the private contractor on the other ground?

Mr. SCHULTZ. The Court of Claims was permitting recovery on the same ground to private contractors if the contractor could prove that the contracting officer in deciding against the contractor had acted fraudulently or made a decision so grossly erroneous as necessarily to imply bad faith. Now, that formula has not been changed over the last 50 years.

Mr. FOLEY. That is what I am talking about.

Mr. SCHULTZ. Let me add this: Mr. Gaskins pointed to the Ripley case, where the Supreme Court used the word "capricious." There has been some leeway, but the Supreme Court has never said that a private contractor can get the Court of Claims to grant judgment to

the contractor by proving simply there was not substantial evidence behind the contracting officer's decision, which is the new language introduced by the McCarran bill and by the modified Comptroller General's bill.

Mr. HYDE. Mr. Schultz, then the only change this makes in the pre-Wunderlich situation is one of degree? In other words, it simply adds the test of substantial evidence?

Mr. SCHULTZ. Yes, but in my opinion that is quite a degree, because as I understand the substantial evidence rule as it is applied in the courts—as good an illustration as any, I suppose, is an appeal from a labor board hearing. If the labor board decides against the employer and the employer decides to take the case to the circuit court, the circuit court will look at the whole record of the labor board to see whether or not there is substantial evidence to support the decision. Now, if the GAO has similar power—in the first place, it is not a court; it is part of our legislative branch—but if it has similar power it could rather easily upset a decision which had been made in favor of a contractor upon which there had been considerable reliance by the contractor or his bank, his surety company, and so forth.

Mr. HYDE. Do you think that would create a lot more difficulty in the banking community than was the situation before?

Mr. SCHULTZ. Yes, I do. Mr. Easterwood submitted a letter to the Senate committee which states that position very well. I think it is appended to the report of the hearings before Senator McCarran's subcommittee.

I also would like to add a footnote to that, and that is that I think there is a real constitutional question here. I think you said yesterday, Congressman Willis, that you did not see as a matter of law why this bill could not be retroactive in favor of contractors, that is, those who entered into contracts before the Wunderlich decision. It seems to me that if any one of these bills is interpreted to give the GAO power to upset a contracting officer for lack of substantial evidence, the Government would then be taking away from the contractor a right he got when he made his contract 2 or 3 years ago with the Government, and under some Supreme Court decisions that raises a question whether or not it is a deprivation of property without due process of law under the fifth amendment. The leading case is *Lynch* v. *United States* (292 U. S. 571), where Justice Brandeis said that the Government may not take away a contract right, which he says is a property right, from a private individual once it has been granted. That involved war risk insurance which was issued after the First World War.

Mr. HYDE. If you omit the substantial evidence test, however, are you not likely in view of some of the language in the Wunderlich case to still be in the same spot we are under the Wunderlich case?

Mr. SCHULTZ. I do not think so, sir.

Mr. HYDE. Did you hear Mr. Phillips yesterday from the Department of Justice?

Mr. SCHULTZ. Yes, sir, I did.

Mr. HYDE. The way they construe the Wunderlich case, it seems to me that the language "fraud" or "grossly erroneous necessarily to imply bad faith" are almost synonymous.

Mr. SCHULTZ. I heard that point expressed. I do think that Justice Jackson's dissent is what the court meant. He dissented from the majority opinion because he said he thought they were eliminating from the old test the gross mistake point, and I do think that the Comptroller General's bill without the "substantial evidence" phrase has the language "capricious" and "arbitrary," and also puts back in "grossly erroneous as necessarily to imply bad faith."

Mr. HYDE. You think the two words "arbitrary" and "capricious" are sufficient to get from under the Wunderlich case?

Mr. SCHULTZ. I do. As a matter of fact, in the majority opinion Justice Minton said the words "arbitrary" and "capricious" are not sufficient, so I take it if the Congress legislated that they were, they would be.

I have taken a great deal of your time. I would like to say in conclusion that it seems to me there are four separate issues here as the hearing has developed. First is the question of the scope of judicial review in view of the Wunderlich decision. My own preference would be for the language of the Comptroller General's modified bill without the phrase "substantial evidence," or Representative Celler's bill, which does not include the phrase "substantial evidence."

The second question, as I see it, is the status of the General Accounting Office. I should like to see not only the GAO taken out of the bill but taken out of the legislative history if that is possible, and that might mean some clarification as to the modified bill.

The third question, I think, is the question of retroactivity. I do not have any strong view on that question. I think that it might be perfectly reasonable, as Congressman Willis has urged, that any bill be made retroactive to take care of contractors who were unfortunate enough to be caught by the Wunderlich decision, you might say; but I do think when you are talking about retroactivity you have to remember that if the Comptroller General's modified bill or S. 24 is enacted you are going to have retroactivity in favor of the GAO in regard to contracts entered into before this act was passed, which, as I mentioned, raises some constitutional doubts in my mind.

Fourthly, it seems to me you have the question of whether or not the all-disputes clause should be prohibited. I think if the Congress feels that that is an unwarranted delegation of power to decide questions of law to contracting officer, section 2 of the McCarran bill takes care of it very adequately, and the bill itself takes care of present disputes which involve questions of fact and law or mixed questions of fact and law.

I think that the ABA proposal is a very reasonable proposal. It meets most of my objections. It completely takes the GAO out of the picture, as I see it, because in the ABA proposal it uses the phrase:

> Notwithstanding the presence in any contract entered into by the United States of a provision relating to the finality or conclusiveness of any decision of an agency official, board or other representative on questions of law or fact arising under such contract, judicial review as provided in section 10 of the Administrative Procedure Act may be had of any such decision by the contractor.

There it only mentions the contractor as having the right of appeal, and hence there would be no implication that the power of the GAO is increased. I would say this, though, in fairness to the GAO. If

the ABA bill were passed, it seems to me the GAO would have legitimate objection, because they then would be stuck with the Wunderlich fraud test, whereas the private contractor would have this new Administrative Procedure Act test. So if you adopt the ABA bill, I would suggest a separate section, something to the effect—I am no legislative draftsman—that "nothing herein shall be interpreted as depriving the General Accounting Office of such power to reverse decisions of contracting officers as existed prior to the decision in *United States* v. *Wunderlich*." That, it seems to me, would protect the legitimate interests of the GAO in being able to do what it was able to do before Wunderlich.

Mr. HYDE. In view of the opinion of the Department of Justice, we still do not know where we stand with that language.

Mr. SCHULTZ. I suppose I beg to differ with the Department of Justice on its interpretation of what the Wunderlich decision means. I realize that as yet the Court of Claims decisions which have interpreted Wunderlich as meaning only fraud alone have not been taken to the Supreme Court.

The only other thought I have on the ABA proposal is that it seems to me there should be a clause saying that the contractor must exhaust his administrative remedies under the contract before he goes to court. As I read the ABA proposal, it would be possible for a contractor to take an appeal directly from the decision of a contracting officer to the Court of Claims. I think in fairness to the administrative agencies that they should have the opportunity to review administratively the decision of their own contracting officer through their boards of contract appeals.

I will be glad to answer any questions. I appreciate your kind attention.

The CHAIRMAN. Thank you, Mr. Schultz. The committee will now recess until 2:30.

(The prepared statement of Mr. Schultz follows:)

STATEMENT OF FRANKLIN M. SCHULTZ, ATTORNEY AT LAW, WASHINGTON, D. C.

My name is Franklin M. Schultz. I was until last fall an associate professor of law at Indiana University School of Law, Bloomington, Ind. I am now an attorney in practice in Washington, associated with the law firm of Purcell & Nelson, Barr Building.

While I was at Indiana I taught the general-contracts course and a number of commercial-law courses during a period of about 6 years. I also have done some research and writing in the contract area, with particular reference to construction and insurance contracts. About a year and a half ago I became interested in the problem created by the Wunderlich decision, and I spent much of the last school year and all of last summer studying the problem. My observations and conclusions were published in the December issue of the Harvard Law Review in an article entitled "Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle Over the Wunderlich Case" (vol. 67, No. 2, December 1953, pp. 217–250).

I should like to make a statement both as a private citizen and as a student of this area of the law, rather than as an attorney for any person, corporation, or association. In my Harvard article I commented in some detail on Senator McCarran's bill, S. 24, as well as a proposal sponsored by the American Bar Association's section on administrative law. My understanding is that, in addition to H. R. 1839, introduced by Chairman Reed, the companion bill to S. 24, this committee will also consider H. R. 3634, introduced by Representative Celler, and H. R. 6946, introduced by Representative Willis. I also understand that Comptroller General Lindsay Warren has proposed a substitute for H. R.

1839 which has received the approval of the Associated General Contractors, the Aircraft Industries Association, the Radio-Electronics Televisiou Manufacturers Association, and interested administrative agencies.

With your permission I should like to comment briefly on each of these proposals and indicate my own preference for the ABA proposal about which Mr. David Reich of the ABA administrative law section will testify.

JUDICIAL, LEGISLATIVE, AND ADMINISTRATIVE REPERCUSSIONS

By way of background this committee may be interested in reviewing what has happened on the administrative, legislative, and judicial levels since the United States Supreme Court handed down its opinion in *U. S.* v. *Wunderlich* (342 U. S. 98 (1951)).

On the judicial front it is now quite clear that the Court of Claims, the leading court dealing with Government contract cases, has taken the Wunderlich decision as meaning that its scope of review of decisions of department heads or their representative contract appeals boards is strictly limited to "cases in which positive fraud is alleged and proved." See *Palace Corporation* v. *U. S.* (110 Fed. Supp. 476, 478 (Ct. Cl. 1953)).

On the legislative front the only concrete result to date has been a rider tacked onto the Department of Defense Appropriation Acts of 1953 and 1954 which reads:

"SEC. 635. No funds contained in this Act shall be used for the purpose of entering into contracts containing Article 15 of the Standard Government Contract until and unless said article is revised and amended to provide an appeal by the contractor to the Court of Claims within ninety days of the date of decisions by the Department concerned, authority for which appeal is hereby granted."

In compliance with this direction from Congress, the Defense Department has added to the disputes clause in its construction contracts that "the contractor shall have such right of appeal to the Court of Claims as is provided by section 635 * * *." The rider was applied to construction contracts, and not to supply contracts on advice of the General Accounting Office and presumably on the theory that article 15 is the number of the standards-disputes clause only in construction contracts.

Inasmuch as a contractor could always appeal to the Court of Claims for a limited review, it may be proper to ask whether this rider adds anything to that court's power of review. On the other hand, if it is to be given some meaning under the usual rule of statutory construction, it may mean that the Court of Claims is no longer bound by Wunderlich and pre-Wunderlich formulae in defense contract disputes and can in effect treat the question de novo. Other questions suggested by the language of the rider are its effect on the 6-year statute of limitations on contract claims and the availability of review in the district courts where the claim is for less than $10,000. It is my candid opinion that this confusing rider should be eliminated before it leads to troublesome litigation.

On the administrative front the Defense Department has voluntarily amended its dispute clause to read: "final and conclusive * * * unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith." The General Services Administration has taken a similar step, although it has limited its change to construction contracts. As far as I know, no other Federal agency with procurement powers has followed suit.

DEFENSE DEPARTMENT AMENDMENT

It seems to me that the Defense Department's amendment to the disputes clause adequately protects private contractors from the arbitrary decision of a contracting officer as reviewed by his department head or the designated appeals board. As a matter of fact, this amendment does more than return the disputes clause to its pre-Wunderlich meaning by adding the words "arbitrary" and "capricious" to the old formula which had read "fraud or such gross mistake as would necessarily imply bad faith or failure to exercise an honest judgment * * *." This addition would appear to be a fair concession to private contractors. In the hands of a careful court it should not result in the sub-

stitution of the court's judgment for the contracting officer's findings. The difficulty is that the Defense Department's amendment has only been half adopted by the General Services Administration, and there is no assurance that it may not at some future date be withdrawn by the administrative agencies concerned.

GOVERNMENT VERSUS CONTRACTOR INTERESTS

At this point I should like to point out that from the Government's point of view the disputes machinery is very essential for getting its contracting work done efficiently, inexpensively, and expeditiously. It would be unthinkable to permit a construction contractor to take every dispute he has with the contracting officer to a court for a full dress trial. From the standpoint of efficiency the contracting officer who is close to the day-to-day operation of a Government supply or construction contract seems indispensable.

On the other hand, from the standpoint of the private contractor, commercial arbitration such as is available under standard AIA contract would seem more fair and more in keeping with his notions of how private contract disputes are settled. Apparently, the Government will not accept compulsory arbitration and experience under the Contract Settlement Act demonstrates that discretionary arbitration has not been widely used. Hence the problem is to safeguard the contractor under the disputes machinery by making sure that arbitrary, capricious, grossly erroneous or dishonest acts of the contracting officer are reviewable.

THE ADMINISTRATIVE BOARDS OF CONTRACT APPEALS

Much can be said in favor of the administrative appeal boards in the various departments which provide a de novo review. Incidentally such an administrative review was not available in the Interior Department at the time of the Wunderlich decision. Of all the appeal boards, the review provided by the Armed Services Board of Contract Appeals in the Defense Department approximates a trial court proceeding most closely. It probably would be helpful if hearings before other administrative boards were more in line with the informal, yet full, hearing afforded by the ASBCA. Opinions could be published and made available and steps could be taken to strengthen the independence and impartiality of the boards. For example, the ASBCA itself could be appointed by and report only to the Secretary of Defense rather than the secretaries of the respective services which carry on a procurement function.

THE M'CARRAN BILL

Turning now to the McCarran bill, by first reaction is that, while it purports to favor the private contractor, it operates like a boomerang in that it undermines the security and bankable quality of Government contracts by permitting the General Accounting Office for the first time in history to reverse a contracting officer's decision favorable to the contractor within the 3-year statute of limitations on grounds other than fraud or gross mistake implying bad faith.

Obviously, the Comptroller General, as watchdog of the Treasury, has a legitimate concern about the recent application of the Wunderlich fraud test against the Government. (See *Leeds & Northrup Co.* v. *U. S.*, 101 F. Supp. 999 (E. D. Pa. 1951).) The General Accounting Office clause in the McCarran bill, however, would do much more than restore the pre-Wunderlich rule; it would set up the General Accounting Office as a second Court of Claims with power to reverse a favorable contracting officer's decision if it decided that there were no substantial evidence to support it. Private contractors, surety companies writing performance and payment bonds, and banks financing long-term contracts have reason to be afraid of the repercussions of this provision.

The formula which the McCarren bill proposes, "fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence," adds two new types of review to the pre-Wunderlich test, namely "gross mistake" and "substantial evidence." It seems to me that the "substantial evidence" type of review would be singularly inappropriate if applied by the Court of Claims, normally a trial court, to an administrative board of contract appeals, which does not hold what could be called a full dress administrative hearing subject to the scrutiny of an appellate court which can determine whether there is substantial evidence on the whole record

to support the agency's determination. On the other hand, the "gross mistake test, while it widens the scope of judicial review, would give an aggrieved contractor full opportunity to prove actual mistake without the necessity of proving "conscious wrong doing and intention to cheat or be dishonest," to quote the language of the Wunderlich opinion.

Section 2 of the McCarran bill which prohibits the use of an all-disputes clause may seem somewhat academic at the moment since the Defense Department, the largest procurement agency, is committed almost exclusively to the fact-dispute clause, but the worst that can be said is that it may accentuate the difficulty courts have in drawing the line between law and fact.

H. R. 3634

Representative Celler's bill, H. R. 3634, is in my opinion much preferable to the McCarran bill. In effect, it would apply the Defense Department amendment across the board. I have some question about the advisability of limiting its retroactivity for only 1 year in view of the fact that the Wunderlich decision is now over 2 years old. But the main difficulty I see with Representative Celler's bill is that while it apparently eliminates the GAO from the picture, the bill as drafted could be used by the Government to reverse its own contracting officer for being "arbitrary or capricious" against the Government. In this respect, while not going as far as the McCarren bill, it would increase the supervisory power of the GAO over contracting officers beyond the situation that existed prior to the Wunderlich case.

H. R. 6946 AND THE COMPTROLLER GENERAL'S BILL

Representative Willis has introduced a bill, H. R. 6946, which is identical with the McCarran bill except that it eliminates the GAO from the picture. Again, however, I should be afraid that the bill as written could be interpreted by a court to permit the GAO to upset a favorable contracting officer's decision for being "grossly erroneous" and "not supported by probative, reliable, and substantial evidence." Similarly, the bill which Comptroller General Warren proposes in his letter to Chairman Reed, dated December 30, 1953, while it purports to eliminate the GAO from the picture, might be interpreted as a two-way street. Certainly, it is apparent from the Comptroller General's letter that he desires greater supervisory power over Government contracting. I do not believe that in any contest the disclaimer paragraph he quotes from Senate Report 32, which accompanied S. 24, would prevail over the language of the bill. It seems to me that if the Government wishes to avoid irresponsible decisions by its contracting officers in the field, the solution is the appointment of better qualified and more responsible officers. If necessary, the Government should provide that decisions on important matters be made only by a chief contracting officer. But once a decision is made favorable to a contractor, absent fraud, it seems highly unfair to permit the Government to go back on its word. Certainly, it is not in keeping with ordinary, decent, principles of fair dealing.

ABA PROPOSAL

As I read the proposal which the ABA's section on administrative law authorized its committee on the finality clause to sponsor as a substitute for S. 24, it avoids the two main difficulties I find with all the pending bills, namely the increased power of the GAO to reverse a contracting officer's favorable decision and inappropriate judicial review of a contracting officer's decision. It has the additional merit that it applies retroactively to contracts negotiated before the dispute clause amendment.

I am not an expert in legislative drafting and I have not made an attempt to draft a particular bill to meet the legitimate interests of private contractors and the Government. I do believe, however, that a bill worked out along the lines of the ABA resolution and in accordance with the criteria of the Administrative Procedure Act, which is becoming increasingly familiar to judges, lawyers, and the public, would provide a fair solution for all interested parties.

I shall be happy to answer any questions which the committee may have concerning any aspect of this problem.

Thank you for your kind attention.

(Communication subsequently submitted by Mr. Schultz:)

PURCELL & NELSON,
Washington, D. C., February 3, 1954.

Hon. LOUIS E. GRAHAM,
Chairman, Subcommittee No. 1, Committee on the Judiciary,
United States House of Representatives, Washington, D. C.

DEAR CONGRESSMAN GRAHAM: Since I appeared before your subcommittee on January 22, 1954, I have had a few ideas on the pending legislation which, with your permission, I should like to put forth as a supplement to my oral testimony, and my prepared statement.

At the conclusion of my remarks I suggested that your subcommittee was faced with four separate problems, namely:

1. The proper scope of judicial review
2. The problem of retroactivity,
3. The status of the GAO, and
4. Prohibition of the all-disputes clause.

As I see it, while problem No. 4 is a separate matter which was not raised by the Wunderlich case, there seems to be little or no objection to section 2 of H. R. 1839, which would prohibit use of the all-dispute clause.

Actually, at the time it was handed down, the Wunderlich decision only raised problem No. 1, the proper scope of judicial review; problem No. 2, the problem of retroactivity, has since arisen because of the lapse of time since the Wunderlich decision. Again, as to the latter, it seems to me that, if Congress wishes to undo the restrictive effects of Wunderlich, problem No. 2 presents no difficulty as far as drafting goes, and is adequately handled by all of the pending bills.

The remaining problem, problem No. 3, which concerns the status of the GAO, was in only a limited sense created by the Wunderlich decision, for, as far as I have been able to discover, even under the pre-Wunderlich test, the GAO has never been able to support its position in court that the Government's contracting officer acted fraudulently or in such a grossly erroneous fashion as necessarily to imply bad faith.

The impetus for S. 24 was a desire for relief for private contractors from the restrictive effects of the Wunderlich decision. However, in granting such relief the draftsmen went considerably beyond the pre-Wunderlich test and engrafted "a reliable, probative and substantial evidence" test. At the same time, the GAO entered the picture and had the bill redrafted so as to make this considerably wider scope of review available to the GAO in reviewing contracting officers' decisions favorable to the contractor.

Although there is superficial logic behind the GAO's position that the right of appeal must be "coextensive," i. e., a two-way street, the logic must yield to the practical consideration that finality in Government decisions is of much greater importance to the private contractor than to the Government for financial and other reasons, which I attempted to spell out in my testimony. It is one thing to return the GAO to the theoretical position it occupied prior to Wunderlich and quite another to set it up as a second Court of Claims, an additional hurdle for private contractors to jump, and perhaps an administrative remedy they may be required to exhaust before going to the Court of Claims; or to give the GAO power to upset a decision favorable to the contractor where it fails to find substantial evidence to support that decision, as I understand the Comptroller General's compromise bill to do.

If, as I suggested in my oral testimony, the bankable quality of Government contracts will be jeopardized by H. R. 1839 and the Comptroller General's compromise bill, the Defense Department and other procurement agencies may well have difficulty in letting contracts to responsible contractors who are unable to undertake large projects without financial backing. It may also affect the ability of contractors to obtain surety bonds, and certainly the price thereof. I might add that it runs counter to the policy behind the Assignment of Claims Act of 1940 which was designed to make Government contracts more negotiable.

The answer to the GAO's concern that contracting officers may squander the Government's money lies not in establishing the GAO as a superagency, but in improving the machinery for final decision making at the procurement agency level by selecting better qualified and more responsible officers.

If your subcommittee desires to adapt one of the pending bills rather than draft a brand new one, one simple solution would be to eliminate the phrase

"substantial evidence" from the Comptroller General's compromise bill. With that deletion the controlling language in the bill would read "unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith * * *" which would provide a liberalized pre-Wunderlich formula. Before Wunderlich the old test read "fraudulent or so grossly erroneous as necesarily to imply bad faith." Use of the phrase "arbitrary and capricious" would, I believe, considerably liberalize the pre-Wunderlich test, would follow the phrasing of the Defense Department disputes clause amendment, and would be in keeping with the language of section 10 (e) (1) of the Administrative Procedure Act. Moreover, even were the proposed bill then interpreted as a two-way street, the power of the GAO to reverse the Government's contracting officer would be only a little greater than it was prior to Wunderlich. In any event, in view of the fact that the GAO has never to my knowledge been successful in court in supporting its reversal of a favorable contracting officer's decision, the addition of the phrase "arbitrary and capricious" should not seriously change the picture. As a practical matter, the Government carries a difficult burden in attempting to prove arbitrariness or capriciousness against the Government on the part of the Government's own agent under a contract dictated by the Government.

An alternative solution would be to leave the phrase "substantial evidence" in the bill but add a separate section making it clear that such review was not available to the GAO.

Personally, I have some doubts about the use of the "substantial evidence" test at all in this area, where you have neither a full-fledged administrative record for a court to examine, nor a court (the Court of Claims or the district court) designed to provide appellate review. In my opinion the "substantial evidence" test should not be grafted on to the Wunderlich test unless Congress provides appropriate legislation for setting up administrative appeals board within all the procurement agencies and appropriate legislation for conferring appellate jurisdiction on the Court of Claims and the district courts, insofar as they act concurrently.

As I said in my statement, I believe that the ABA bill with slight modifications would likewise meet the objectives your subcommittee is seeking, without increasing unduly the supervisory power of the GAO. Apparently, the ABA bill provides for direct review of a contracting officer's decision without exhaustion of the administrative remedy before the appropriate board of contract appeals. This unintentional oversight in drafting could be remedied by adding to the ABA proposal the following clause:

", provided that the contractor has exhausted such administrative remedies as the contract may provide."

A second modification which I suggest, in order to be absolutely fair to the GAO, would be to add a section to the ABA bill to the effect that:

"nothing herein shall be interpreted as depriving the General Accounting Office of such power to reverse such decisions as existed prior to the decision in *U. S.* v. *Wunderlich* (342 U. S. 98 (1951))."

As a matter of fact, in any bill which is finally reported out by this committee, I think it advisable to treat the upset power of the GAO separately from the right of a private contractor to obtain judicial relief.

Finally, I should like to repeat that, in my opinion, Congressman Celler's bill, H. R. 3634, provides a satisfactory solution for all problems but retroactivity and prohibition of the all-disputes clause, both of which could readily be taken care of.

I appreciate the courtesies you and the subcommittee have so kindly extended to me.

Sincerely yours,

FRANKLIN M. SCHULTZ.

(Whereupon, at 1 p. m., the committee was recessed, to reconvene at 2:30 p. m.)

AFTERNOON SESSION

The CHAIRMAN. The committee will be in order.

Mr. FOLEY. Mr. Miller.

STATEMENT OF BURTON F. MILLER, REPRESENTING THE CONTRACTORS' DIVISION OF THE AMERICAN ROAD BUILDERS' ASSOCIATION

Mr. MILLER. Mr. Chairman and members of the committee, my name is Burton F. Miller, and I appear on behalf of the American Road Builders' Association, more particularly the contractors' division of the association, which is comprised of approximately 2,000 firms engaged primarily in the construction of highways, airports, and other forms of public works.

Mr. Chairman, our viewpoints as set forth in my prepared statement have, I believe, been very adequately covered by previous witnesses. It is certainly not my intent to burden the committee with repetition. I, therefore, would like to ask permission, Mr. Chairman, to incorporate this statement as part of my remarks.

The CHAIRMAN. Granted.

(The statement referred to is as follows:)

STATEMENT OF AMERICAN ROAD BUILDERS' ASSOCIATION

This statement is presented on behalf of the American Road Builders' Association, a national organization representing a cross section of the highway industry and profession. A substantial segment of our membership (approximately 2,000) engages in the performance of Federal construction contracts.

The American Road Builders' Association wishes to go on record in support of legislation before your committee providing for judicial review of decisions of Government contracting officers in cases of disputes of questions of fact arising under contracts with the United States. The urgency of congressional consideration of the subject presented by these bills was brought sharply into focus by the decision of the United States Supreme Court in the case of *U. S. v. Wunderlich* (72 Sup. Ct. 154). The disputes clause of the Standard Form of Government Contract (as interpreted in the Wunderlich decision) is so manifestly unjust that it threatens to disrupt the vast public works program of the United States, with resultant dislocations not only in the construction industry but the economy of the Nation.

With due respect for the Court, it is submitted that in the Wunderlich decision it showed a complete unawareness of the facts of industrial life. The Court states: "Respondents were not compelled or coerced into making the contract. It was a voluntary undertaking on their part. As competent parties they have contracted for the settlement of disputes in an arbitral manner." Such a statement completely ignores traditional practices in contracting for Federal construction. When a contractor submits a bid to the United States, he must submit it on the form prepared by and submitted to the contractor by the United States. There is no room for bargaining over the wording of the contract as there would be between private parties—either the contractor executes the form prepared by the United States or his bid is not even considered. Of necessity, the contractor "voluntarily" submits his bid but the alternative is not to bid at all, thereby eliminating himself entirely from Government business. In many cases this would be tantamount to a declaration of voluntary bankruptcy.

The Federal construction program has a pronounced influence on the economic stability of the entire construction industry. Should the conditions of Government construction contracts be too severe to permit contractors to undertake the hazard, this vast reservoir of potential business will gradually dry up. The results are obvious. In turn, this would mean the liquidation of a substantial percentage of the resources of the construction industry which are so vitally important to the national economy.

Furthermore, as was clearly demonstrated during World War II, in times of national emergency the facilities of the construction industry go to war. Again, in answer to the Court's suggestion that contractors "voluntarily" enter into Government contracts, it may be noted that during the last war private construction was reduced to a negligible amount and the only work available to contractors was for the Government in prosecuting the war effort. Under such

conditions it appears rather ridiculous to say that the contractor need not accept the Government contract if he does not want to. The real answer to the problem is that the stipulations of Government contracts should be fair and reasonable and encourage participation of private enterprise rather than forbid or discourage the same.

For years the construction industry has been diligently seeking administrative relief from the unfairness of the Government's so-called disputes clause. Such efforts have proved futile, as evidenced by the Wunderlich case and it is now apparent that relief can only be secured through legislation. Apparently recognizing the harshness of its decision, the Supreme Court went so far as to suggest that legislation might be desirable.

As the situation now exists, there is no appeal from a decision of the department head on questions of fact. As pointed out by the Court of Claims in the Wunderlich case where "courts have had jurisdiction to review questions of law but not questions of fact, they have held that they could review questions as to the interpretations of contracts (*U. S.* v. *E. J. Biggs Construction Company*, 116 Fed. 2d 768, 770)." The entire dispute in the Wunderlich case was over the question of just what the specifications and drawings required of the contractor. But, the Supreme Court says that such is a matter to be determined by the contracting officer subject only to appeal to the department head and that the decision of the department head is final absent of "fraud alleged and proved." Then, the Court says, "by fraud we mean conscious wrongdoing, and intention to cheat or be dishonest." Even the most honest of men are not infallible, or free from arbitrary action. It must be assumed that Government officers are, with few exceptions, honest. But such honesty and loyalty to the Government, coupled with zealousness, often tend to blind them to facts. It is therefore evident that if Government contractors are to be afforded reasonable protection from the abuse of Government contracting officers they must be entitled to the right of judicial review in cases where it has been clearly established that the determinations in question indicate such gross mistake as to imply bad faith even if it has its origin in overzeal, gross negligence, prejudice, misrepresentations, however innocent, or other causes that result in an arbitrary or capricious decision even though they may fall short of actual fraud, alleged and proved. The important thing to remember is that the Supreme Court did not say that the contracting officer was right or that the Court of Claims was wrong—in effect the Court said that right or wrong the decision of a contracting officer is final.

In consideration of the foregoing, it is respectfully recommended that corrective legislation be enacted at the earliest possible date in the interest of business generally as well as the Government. The atmosphere created by the Wunderlich case must be clarified so that Government contractors will have reasonable assurance of fair treatment and that all can know with certainty the limitations of and rights and obligations under the so-called dispute clauses. Furthermore, in fairness and equity, such legislation should be made applicable to all cases that have not reached final judicial determination.

Mr. MILLER. To summarize our position, Mr. Chairman, we strongly support remedial legislation to restore the status quo, if you please, of contractors with regard to the determination of disputes to that level prevailing prior to the Wunderlich case.

Secondly, we strongly favor retroactive provisions of any such legislation so that the legislation that may be enacted would cover all contracts not having previously reached a stage of final adjudication.

And, Mr. Chairman, in conclusion, I would like to make just two other points that have been raised repeatedly before your committee. First, that remedial legislation such as we suggest would result in, or precipitate a flood, if you please, of litigation. Based on approximately 20 years' experience in the construction industry I do not believe that such allegations are well founded, for several reasons I might mention.

I find, actually, that contractors on the whole, especially in the construction industry, are somewhat allergic to litigation. First, there is the cost of litigation. But perhaps even more important to the

average contractor, who has time schedules to meet, who faces liquidated damages for failure to meet such schedules, is the fact that he finds it extremely expensive and time consuming to be involved in litigation where the contractor as well as his key personnel are frequently required to travel long distances to prosecute such claims.

Furthermore, and I believe, Mr. Chairman, that this is rather fundamental, the average contractor engaged in the prosecution of public works for the Government entertains a natural reluctance to sue the Government. I cannot conceive of any flood of litigation resulting from the legislation before your committee.

Mr. Chairman, that concludes my statement, and we are extremely grateful for the privilege of appearing before your committee.

The CHAIRMAN. Thank you, Mr. Miller.

Mr. MILLER. Thank you, Mr. Chairman.

Mr. FOLEY. Mr. McNamee.

Mr. Chairman, Mr. McNamee was to submit this prepared statement on behalf of Mr. Francis T. Greene, executive vice president of the American Merchant Marine Institute.

The CHAIRMAN. Let it be admitted.

(The statement of Francis T. Greene, executive vice president of the American Merchant Marine Institute, Inc., is as follows:)

STATEMENT OF FRANCIS T. GREENE, EXECUTIVE VICE PRESIDENT AMERICAN MERCHANT MARINE INSTITUTE, INC.

My name is Francis T. Greene. I am the executive vice president of the American Merchant Marine Institute, 11 Broadway, New York 4, N. Y., and 1701 K Street NW., Washington 6, D. C., which represents the owners of American-flag oceangoing ships totaling more than 9 million deadweight tons, a substantial majority of all of the American-flag merchant marine of all categories.

The American Merchant Marine Institute fully supports the principle that there should be a fair and appropriate degree of reviewability of administrative decisions made under the so-called Government disputes clause in the administration of Government contracts. However, we oppose with equal vigor S. 24 in so far as it establishes the General Accounting Office as a sort of intermediate or "floating" court and vests it with express statutory authority to set aside such a decision merely because its administrative officers in their opinion consider the decision not to be supported by substantial evidence. On the other hand, we fully agree that a decision of a contracting officer or, upon appeal, of the head of the contracting agency, should be subject to judicial review and reversal by the courts if it is found to be arbitrary, capricious, so mistaken as necessarily to imply bad faith, or not to be supported by substantial evidence. This judicial function, however, should not be shared with or otherwise vested in the General Accounting Office or the Comptroller General. Under S. 24, decisions under the standard form of the Government disputes clause appear to be expressly subject to frustration simply because the General Accounting Office, as distinguished from a court of competent jurisdiction, may consider the decision to be, inter alia, "not supported by reliable, probative, and substantial evidence." The literal effect of S. 24 appears to be that once the General Accounting Office may have found the decision to be not supported by substantial evidence, it may not thereafter be pleaded in court either by the contracting party or the Government as limiting the scope of judicial review to that provided for by the disputes clause.

On the other hand, the American Merchant Marine Institute finds no objection either to the substitute bill suggested by the Comptroller General of the United States in his letter to the chairman of this committee dated December 30, 1953, and as to which Mr. Lyle Fisher testified yesterday. That substitute, which I understand to be the product of joint industry-Government consultation, does not vest the General Accounting Office with authority to set aside administrative decisions of questions of fact arising under a Government contract. On the contrary, it provides that the decision of the head of the contracting agency

"* * * shall be final and conclusive unless the same," among other things, "is not supported by substantial evidence." This would clearly appear to leave the finding of a lack of substantial evidence by which the finality of the disputes clause can be vitiated, with the courts where it belongs. By the same token, the American Merchant Marine Institute finds no such objection either to H. R. 3634, H. R. 6946, or to the succinct bill suggested on behalf of the American Bar Association which would subject such decisions on questions of law or fact arising under Government contracts to judicial review as is now provided in section 10 of the Administrative Procedure Act, a statute the standards of which have long been familiar to the courts and the bar. I must, however, respectfully reiterate the objection of the American Merchant Marine Institute to the dangerous and historically impractical procedure of splitting the jurisdiction to set aside the finality of fact decisions under a disputes clause between the courts and the General Accounting Office.

Mr. FOLEY. Mr. Pasley.

STATEMENT OF ROBERT S. PASLEY, ASSISTANT GENERAL COUNSEL OF THE NAVY DEPARTMENT

Mr. PASLEY. Mr. Chairman, my name is Robert S. Pasley. I am Assistant General Counsel of the Navy Department.

I am appearing this afternoon for the Department of Defense, to supplement the testimony given by Mr. Niederlehner yesterday afternoon. Mr. Niederlehner is the Deputy General Counsel, Department of Defense. I merely want to make a very brief statement of the position of the Department of Defense on the proposed legislation.

As Mr. Niederlehner stated yesterday, our basic position is that we do not feel that legislation is necessary because, so far as the Department of Defense is concerned, we have changed the form of our disputes clause and we feel that that has eliminated most of the problem.

However, if this committee should feel in its judgment that legislation is necessary or desirable, the Department of Defense feels that legislation in the form proposed by the Comptroller General in his letter to the chairman of December 30, which would be a form of an amendment to S. 24, the revision of S. 24, would be workable and we would not object to it.

We are impressed by the fact that, this morning, representatives of three of the very largest and most important trade associations, who themselves represent a very large and important segment of defense industry, contractors with whom we deal, have stated that they would not object, or would support legislation in that form. And, since, after all, they are the people with whom we are placing these contracts, we feel it is quite important that there be a meeting of the minds, as it were, and that we all be, so far as possible, satisfied with the position taken by each other with respect to contract clauses.

In other words, to summarize it, while we do not feel that legislation is necessary, if the committee wishes to recommend legislation we would be satisfied if the committee saw fit to recommend the bill of the Comptroller General as proposed.

Mr. HYDE. Inasmuch as the Department has already changed its regulations to conform with the purpose of the bill, I take it that you are not opposed to the bill in principle.

Mr. PASLEY. That is correct, sir. We do feel that it is not necessary.

Mr. HYDE. Inasmuch as the principle is there, I do not think it would be opposed.

Mr. PASLEY. We have to admit that the legislation goes further than the revision we have made to our contracts.

Mr. HYDE. In what respect?

Mr. PASLEY. For example, our present contract clause does not use the words "substantial evidence," and it implies only prospectively. In other words, we have not gone back and put our new disputes clause into any old contracts. I believe the amendment to our regulation went into effect last year, September 1952, I think it was, and from that day on all new contracts entered into by the Department contained the clause.

Mr. HYDE. Unless we have this additional provision that is in the bill that is not in your regulation, do you not think there is some change indicated?

Mr. PASLEY. There is no question, on the old contracts that do not have this new clause.

Mr. HYDE. I mean even your revised article.

Mr. PASLEY. Sir, our revised article, we feel, does take care of most of the features of the Wunderlich case that contractors found objectionable. We provide in there that decision will not be final if it is found by a court of competent jurisdiction that it is arbitrary or capricious. We do not say anything about "substantial evidence." How much difference that makes, in fact, I do not know, but I think the main thing is that the revision operates prospectively and not retroactively.

The CHAIRMAN. Thank you.

Mr. FOLEY. That completes the list of witnesses, Mr. Chairman.

The CHAIRMAN. If there are any other persons that have any statements they wish to file with the committee, you have that opportunity.

Mr. EASTERWOOD. If it pleases the committee, I would like to file a letter from Mr. H. W. Morrison, president of the Morrison-Knudsen Co., as being in favor of the proposed rewording of Senate bill 24 as appears in the General Accounting Office version.

My name is O. P. Easterwood, Jr.

(The letter referred to is as follows:)

MORRISON-KNUDSEN CO., INC.,
January 19, 1954.

From: H. W. Morrison.
Location: Boise office.
To: Mr. O. P. Easterwood, Jr.
Location: Washington, D. C.
Subject: Wunderlich legislation.

I have had our attorney, Mr. Smith, compare the language presently appearing in Senate bill 24 with the proposed rewording as appears in the General Accounting Office version. He states that we should have no objection to the revision of the wording, and, therefore, the amended version is quite acceptable to us.

We are hopeful that the AGC will do those things necessary to clarify the situation as to the differing versions proposed.

Please continue to follow on this matter.

Yours very truly,

H. W. M.

Mr. FOLEY. Mr. Chairman, I have over a dozen statements and letters that I have been asked to have inserted in the record and I request permission to insert them.

The CHAIRMAN. So ordered.

(The documents referred to follow:)

STATEMENT OF HON. JAMES G. FULTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

This statement is in support of H. R. 1839. Of necessity its history goes back to November 26, 1951, when the United States Supreme Court handed down its decision in the matter of *United States* v. *Wunderlich* (342 U. S. 98). Wunderlich had sought to recover upon a Government contract which contained an article that all disputes involving questions of fact shall be decided by contracting officer with right of appeal to head of department whose decision shall be final and conclusive. The Court held that where there was no allegation of fraud and there was no finding of fraud, the finding by the Court of Claims that decision of the Secretary of Interior was arbitrary, capricious, and grossly erroneous was insufficient to overthrow the finality of the decision of the department head.

Under this ruling the right of appeal from the decision of contracting officers and department heads has been so drastically limited that there can be judicial review revolving a question of fact only in the event that fraud can be alleged and proved.

This strict limitation has deprived contractors of the fundamental right of judicial review of disputes arising under Government contracts and has made administrative agencies which are parties to the contract the final judges of their impartial administration. Contractors are thus at the mercy of Government agencies. This was recognized by the three dissenting justices of the Supreme Court. Justice Jackson in his dissenting opinion wrote:

"Granted that these contracts are legal, it should not follow that one who takes a public contract puts himself wholly in the power of contracting officers and department heads * * * I still believe one should be allowed to have a judicial hearing before his business can be destroyed by administrative action."

Justice Douglas with whom Justice Reed concurred wrote:

"We should allow the Court of Claims, the agency close to these disputes to reverse an official whose conduct is plainly out of bounds whether he is fraudulent, perverse, captious, incompetent, or just palpably wrong. The rule we announce makes government oppressive."

The majority of the Court realized what was being done for Justice Minton wrote:

"The limitation upon this arbitral process is fraud, placed there by this Court. If the standard that we adhere to is too limited, that is a matter for Congress."

Those who have testified before this committee have amply demonstrated that the standard adhered to by the majority of the Court is "too limited." By joining with the United States Sentate which has passed S. 24, an identical companion bill to H. R. 1839, the House of Representatives can correct the inequity now existing for those who deal with the Government by contract.

MID-WEST WAX PAPER CO.,
Fort Madison, Iowa, January 19, 1954.

HON. CHAUNCEY W. REED,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR SIR: Replying to your letter of January 13, we regret that we will not be able to appear and testify on Thursday January 21, 1954, at 10 a. m. in room 346, Old House Office Building in regard to hearings on H. R. 1839, H. R. 3034, H. R. 6946 and S. 24, relating to judicial review of Government contracts.

We would, however, like to submit the following statement for insertion in the record:

"Recent Supreme Court decisions have emphasized the fact that the decision of the contracting officer of the Government is final, and precludes contract review of the contract in question and its performances. Such a holding is decidedly unfair to Government contractors, and they should have the right to have the courts review matters arising out of the contract, in the same manner as contracts between private citizens.

This is especially desirable inasmuch as the Supreme Court has previously held, many times, that in such types of contracts the Government is governed by the same laws of contract as a private citizen."

We feel that, as frequent Government contractors, small business has no recourse when differences arise and that any business accepting a Government contract should have the same protection that he does have from laws governing private companies.

Very truly yours,

MORTON W. DENEBEIM, *President.*

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D. C., January 19, 1954.

Hon. CHAUNCEY W. REED,
Representative of Illinois,
House Office Building, Washington, D. C.

DEAR COLLEAGUE: I have received numerous letters in favor of passage of H. R. 1839.

As I understand, the Judiciary Committee will be holding a hearing on this bill, and like bills, on Thursday, January 21. I am enclosing a letter which I would like you and your committee to consider while you are studying this particular legislation. I felt that you might like to know just what the reaction of people in my district of South Dakota is.

Thank you kindly.

Cordially,

HAROLD O. LOVRE,
Member of Congress.

ASSOCIATED CONTRACTORS OF SOUTH DAKOTA,
Huron, S. D., January 7, 1954.

Hon. HAROLD LOVRE,
United States Representative,
House of Representatives, Washington, D. C.

DEAR CONGRESSMAN LOVRE: Our association would appreciate your support of H. R. 1839 by Representative Chauncey W. Reed, of Illinois. This is an identical bill to S. 24, by Pat McCarran, of Nevada, which has been passed in the Senate.

This legislation is necessary to define the right of judicial review in contract disputes on federal construction work projects because of the decision made in the courts on the Wunderlich case about which we have written to you before.

Prior to the Supreme Court decision in the Wunderlich case, the contractors did have the right to go to the Court of Claims with their disputes. This decision has had three principal harmful effects.

1. The decision has deprived contractors of the fundamental right of judicial review of disputes arising under governmental contracts and has thus created an inequity in our laws currently governing contractual relationships.

2. The decision has made the administrative agencies of Government which are parties to the contracts also the final judges of their impartial administration, giving the agencies both administration and judicial functions.

3. The decision has left contractors at the mercy of Government agencies. This has added another hazard to the business of contracting for the Government. For each hazard the prudent general contractor must add a contingency to his bid. This increases the cost of construction.

We believe that this legislation is in the public interest in that it will correct an inequity and restore justice to the parties to a Government contract, and that it will encourage more economical construction by removing one of the hazards of contracting with the Government.

Members of our association would appreciate your consideration of this request for your support of this legislation.

Thanking you and with best personal regards, we are

Yours very truly,

ASSOCIATED CONTRACTORS OF SOUTH DAKOTA,
By H. M. PIERCE, *Secretary.*

Hon. CHAUNCEY W. REED,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: It has come to the attention of the responsible management of the Fairchild Engine & Airplane Corp. that, on January 21, 1954, your committee will consider H. R. 1839, the companion bill to S. 24 which was passed by the Senate on June 8, 1953. It is also understood that you will consider the substitute draft bill set out in the letter, dated December 30, 1953, from the Comptroller General of the United States, to you.

It is the purpose herein to urge that your committee report favorably the aforesaid draft with certain brief but significant modifications. The modifications are intended to eliminate certain confusion which has heretofore prevailed in performance, both by Government representatives and by Government contractors, under the standard disputes article as it currently appears in Government contracts. As now written, that article technically prohibits Government contractors from presenting for determination pursuant to the written terms of the contract, the full dispute at issue if that dispute involves both questions of law and questions of fact. Such presentation is now limited to questions of fact. It is, more often than not, impracticable if not impossible to do justice by separating the two interlocking and interdependent categories of issues. Also, it is difficult and impracticable for lay (nonlegal) persons to differentiate between questions of law and questions of fact.

At present when a dispute arises under a Government contract, the contractor must determine whether or not the issue is one of law or of fact, or both. The contracting officer must also make this decision. If the contracting officer denies the claim, in effect, by refusing to take jurisdiction because he determines the issue to be one of law (i. e., unliquidated damages for breach of contract), there is no other recourse open by way of appeal to the Department head, hence appeal to the court of competent jurisdiction is the remaining avenue, such right having then accrued because, in such event, the question does not have to be submitted to the Department head for determination (*Plato* v. *United States*, 86 Ct. Cl. 665, 678; *Phoenix Bridge Co.* v. *United States*, 85 Ct. Cl. 603, 626). Because there is no contractual authority permitting the same, if the contractor decides to have the Department head resolve the jurisdictional issue, and it is resolved adversely, the 6-year statute of limitation (28 U. S. C. 2401, 2501) within which appropriate court redress must be sought is not tolled, but continues to run during the waiting period. (See *American Standard Shipfitting Corporation* v. *United States*, 70 Ct. Cl. 679 and *Hendricks* v. *United States*, 81 Ct. Cl. 609.) And that period is occasionally substantial because the jurisdictional question is frequently not decided until other related factual issues have been decided. And yet, if a contractor uses his judgment in deciding that an issue, or portion thereof, is a law question, files a claim in the court of competent jurisdiction and the court, ruling the issue is one of fact, denies the claim because of the technical failure to exhaust the administrative remedy (see *United States* v. *Blair*, 321 U. S. 730, 736, and *United States* v. *Holpuch Co.*, 328 U. S. 234, 240), the contractor technically has no further right under the contract to have the fact question determined by the department head, because his presentation for appeal is untimely pursuant to the limitations prescribed in the disputes article. Under such circumstances he shall have lost his right to have the dispute determined, because of his inability to determine in advance the ruling of the court.

Therefore, the disputes articles as now written in Government contracts places the burden by contract provision upon the parties to the contract to determine the difference between the interdependent and interlocking elements of a dispute which are law questions and not subject to appeal to the department head and those elements which are fact questions and are properly subjects of such appeal. There is probably no single point of disagreement so pronounced within legal and judicial circles as that which requires definition of the difference between law questions and fact questions. Usually, where one exists, there is the other, related collaterally, subordinately or predominantly. Mr. Wigmore in his text on Evidence (1940), volume 1 pages 1–3, establishes that this difference is hard to define. Most certainly then, determination of this legal question should not, by contractual agreement, be required to be resolved by the parties to a contract before permitting the orderly process of law to make the determination thereof upon each instance of its coming into issue. Accordingly, Government contracts should not prohibit contractors from presenting for determination to contracting officers the full dispute including questions of law (i. e., interpreta-

tion of contract conditions) which are frequently related to questions of fact. In denying a claim a contracting officer usually does in fact consider and determine question of law and this he must do in order to give any answer or decision to contractors. The same obtains, as it should, with respect to the appeal to the head of a department or his authorized representative or board. However, any such determination insofar as they relate to questions of law must, in orderly process of the law, be subject to review by the proper higher authority. The General Accounting Office's scrutiny would protect the Government by reason of Comptroller General's right to approve or disapprove payments based on erroneous administrative determinations of law questions and the Court of Claims or other appropriate court would protect the contractor in such event. Then too, the legally trained representatives of the department heads, or other legal advisers, would presumably recommend as to the propriety or impropriety of making certain determinations as to which the weight of judicial precedent has established a rule.

No contract provision limiting departmental determinations to questions of fact is necessary to permit this orderly process to go forward. On the contrary, elimination of such limitation would contribute to the smoother operation of this process by doing away with the confusion, to say nothing of the additional expense to both parties, which often surrounds interpretation of the disputes article as it is now written. It would permit a contractor to have the right to submit for determination the full dispute and to receive an answer thereto in whole or in part. The contracting officer may refuse jurisdiction, wholly or partially, but such refusal would be subject to appeal to the department head if desired by the contractor. The department head might in turn refuse to take such jurisdiction but, at least, the final authority would have given an answer and, at that point, the contractor would have a final determination from the highest intradepartmental authority covering the entire dispute. At that point also the contractor would acquire the right to appeal to the appropriate court on questions of law. Of course, if the contractor elected at an earlier stage to waive his right of appeal to the department head on law questions and to make the tentative decision on his own initiative that the dispute involved a purely legal question, he could go directly to the courts for resolution of the issue. However, if he erred in his tentative decision, as stated above, he thereby loses his right to final departmental appeal.

There are certain types of disputes as to the classification of which the courts and administrative officials are in general agreement. It is generally conceded by such authorities that the following are properly classified as predominantly or purely law questions:

(1) Damages for breach of contract: (*Miller* v. *United States* (111 Ct. Cl. 252, 330); Comptroller General's Decision No. B–95334; *Plato* v. *United States*, (86 Ct. Cl. 665); *Langevin* v. *United States* (100 Ct. Cl. 15); *Silberblatt and Lasker Inc.* v. *United States* (101 Ct. Cl. 80, 81); *Arthur E. Magher Co. Inc.*, Navy Board of Contract Appeals No. 146; *Charles H. Thompkins Co.*, Armed Services Board of Contract Appeals No. 306 and 570; *Rust Engineering Company* (N. B. C. A. 127)).

(2) Reformation: (*Magoba Construction Company* v. *United States* (99 Ct. Cl. 662, 690)).

(3) Rescission: (*Carlton Products Co.* N. B. C. A. No. 154.)

However, there is generally not so great agreement as to whether or not the following are predominantly or purely law or fact questions:

(*a*) Interpretation of contract conditions: The courts usually hold that they are predominantly law questions. However numerous administrative and quasi-administrative rulings are replete with interpretations of contract conditions as such is the very essence of most disputes—(*Phoenix Bridge Co.* v. *United States* (85 Ct. Cl. 603); *Neider Mfg. Co.*, Armed Services Board of Contract Appeals' Decision of October 28, 1952; *M. M. Sundt Construction Co.* A. S. B. C. A. No. 1414; *S. S. Ganick Corporation*, A. S. B. C. A. No. 1420; *Callahan Construction Co.*, 91 Ct. Cl. 538).

(*b*) Mixed law and fact questions: (*Albina Marine Iron Works* v. *United States* (79 Ct. Cl. 714, 722, 723); *Lyons* v. *United States* (30 Ct. Cl. 352, 365); *Collins and Farwell* v. *United States* (34 Ct. Cl. 294, 332)).

(*c*) Questions involving cost: (Comptroller General's Decision No. B–113, 252; *Schwartz* v. *United States* (106 Ct. Cl. 225, 237)).

(*d*) Equitable adjustment questions: (*United States* v. *Callahan Walker Construction Company* (317 U. S. 56); *J. A. Ross & Co.*, War Department Board of Contract Appeals No. 788; *Silberblatt & Lasker, Inc.* (101 Ct. Cl. 54)).

From the foregoing it can be seen, first, that there are some standard legal measures which Government representatives can use in order to determine their jurisdictional problem involving whether or not a question is one of law or of fact and which will permit contractors to determine at an early stage whether or not they wish to take advantage of their right of interdepartmental appeal procedures, and second, that, when the Government officials have erred or have taken improper jurisdiction, the appropriate courts and the General Accounting Office are wont to step in and zealously protect the interests of both the contracting parties by utilizing normal, orderly, legal process. Hence, the desirability of permitting the contractor to present for determination to the contracting officer and the Department head the full dispute in all of its aspects without express contract limitation to "questions of fact" only, can be seen.

The limitation should properly run to require finality only as to such fact questions. Permitting all the elements of a dispute to be presented for determination would give the contractor the right to his full statutory limitation period, after final departmental determination of the entire dispute, within which to appeal to the courts, if he chose to use the contract provisions providing for appeal to the department heads on the question of jurisdiction (see the Plato and Phoenix Bridge cases cited supra). Such procedure would also, as stated, eliminate the confusion and expense involved in requiring by contract that the contractor is not even permitted to present to the Department for the Department's final determination, the full dispute because it contains both fact and law questions, often inseparable.

The desire of the Department of Defense to eliminate the confusion caused by this limitation expressed in contract conditions is evidenced by its directive issued on July 19, 1950 (16 F. R. 4320), effective May 1, 1949, as modified June 30, 1949, being appendix A to the Armed Services Procurement Regulations. This directive or memorandum, recited among other things, that the Armed Services Board of Contract Appeals was designated to hear, consider and determine as fully and finally as might each of the Secretaries (Army, Navy and Air) disputed questions appealed from decisions of Contracting Officers or other authorities pursuant to provisions of armed services contracts. The determination of questions involving unliquidated damages is prohibited by this directive unless the contract calls for such determination. This directive reads further, in part, as follows:

"When an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the Board may nevertheless in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue * * *

"It shall be the bounden duty and obligation of the members of the Armed Services Board of Contract Appeals to decide appeals to the best of their knowledge and ability in accordance with applicable contract provisions, and in accordance with the law pertinent thereto. * * *"

Therefore, it can be seen that the authority behind this implementing directive certainly intended to permit the Armed Services Board of Contract Appeals on behalf of the cognizant Secretaries, to consider both law and fact questions when it became necessary, in the Board's discretion by its application of the laws and measures (aforementioned), to appropriately resolve to its best ability the full dispute presented for its consideration. Such procedures is violative of no right of either contracting party to take advantage of normal, provided procedure in presenting their appeals concerning law questions to the Courts or the General Accounting Office for proper jurisdictional disposition. Nor does such procedure invade or purport to invade the jurisdiction of said appelate authority.

Accordingly, it is respectfully requested, first, that H. R. 1839, now resting with the House Committee on the Judiciary for its consideration, be reported favorably in substantially the same form as that of the aforesaid substitute draft and, second, that, prior to such action, the said draft be modified and approved so as to read as follows:

"AN ACT To permit review of decisions of the heads of departments, or their representatives or boards, involving questions arising under Government contracts

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of

any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence, or is made pursuant to a provision prohibited by section 2 hereof.

"SEC. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative or board, or contractually limiting any said decision to determinations of questions of fact."

Your early and adequate consideration of the foregoing recommendations will be greatly appreciated.

Respectfully,

THOMAS F. DAWSON,
Counsel Fairchild Guided Missiles Division and Stratos Division, Fairchild Engine and Airplane Corporation.

Mr. FOLEY. And with the permission of the chairman, I also place in the record a report from the Secretary of Defense on bill H. R. 1839, an additional report to S. 24, the report of the Comptroller General on the bill H. R. 1839, report from the Comptroller General on the bill S. 24, and a report from the Department of Justice on the bill H. R. 1839 and S. 24, also reports from the Department of Defense and Comptroller General on H. R. 3634.

The CHAIRMAN. So ordered.

(The documents referred to are as follows:)

OFFICE OF THE SECRETARY OF DEFENSE,
Washington 25, D. C., February 21, 1953.

Hon. CHAUNCEY W. REED,
Chairman of the Committee on the Judiciary,
House of Representatives.

Dear Mr. CHAIRMAN: This will reply to your recent request for the views of the Department of Defense with respect to H. R. 1839, a bill to permit reviews of decisions of Government contracting officers involving questions of fact arising under Government contracts in cases other than those in which fraud is alleged, and for purposes. It is noted that H. R. 1839 is identical to S. 24, as it was reported to the Senate by the Judiciary Committee on February 4, 1953.

This legislation would apply to contracts in which the United States is a party and, in litigation thereon, would prevent the pleading of any provision in such contracts relating to the finality or conclusiveness of administrative findings when such provisions limit judicial review to cases in which fraud is alleged. The bill further provides that any such contract provision shall be void in cases in which the General Accounting Office, or a court with jurisdiction, finds the administrative determination fraudulent, grossly erroneous, so mistaken as to necessarily imply bad faith or not supported by reliable, probative, and substantial evidence. Section 2 of the bill would prohibit the United States from including in any of its contracts provisions making administrative decisions on questions of law final.

For at least a century in this country commercial experience, with respect to contracts, including those to which the United States is a party, has dictated that every reasonable and workable effort be made to assure the finality of performance of contractual obligations without resort to litigation. Normally, in private contracts the practice has been to adopt special arbitration provisions providing for the designation of third parties to settle disputes as to performance and to provide for the conclusiveness of facts determined pursuant to such arbitration procedures. Such procedures are designed primarily to, and have the effect of, reducing litigation and assuring proper and expeditious performance of contractual obligations. Courts have consistently recognized these functions, given legal effect to such determinations, and required literal compliance with the terms of the contracts providing for such arbitration.

The same considerations which dictate a need for finality and expeditious settlement of disputes between private parties have naturally applied to disputes

under contracts to which the United States is a party. It has not, however, been legally possible for the Government to agree to submit disputed cases to third parties. Therefore, by custom of many years standing, this has been taken care of by including in public contracts so-called disputes clauses making provision for initial determination by a designated officer of the executive department concerned and for appeal to the secretary of that department, or his designee, whose determinations are made final. In decisions over a long period of time the courts have sustained this procedure and given to disputes clauses in Government contracts the extent of finality prescribed by their terms, permitting collateral attack through court action in cases in which fraud or gross mistake implying bad faith has been involved or the administrative decision was arbitrary or capricious. (See *U. S.* v. *Moorman*, 338 U. S. 457.) In a recent case, however, *U. S.* v. *Wunderlich* (342 U. S. 98), the Supreme Court appeared to further narrow the scope of judicial review in disputes clause cases to those in which fraud is affirmatively alleged and proved.

The Wunderlich case involved the finality of a disputes clause generally known as section 15 of the standard Government construction contract which provided in pertinent part that "all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned * * * whose decision shall be final and conclusive upon the parties thereto." The Supreme Court, on the ground that fraud was not alleged and proved in the case, gave literal effect to this contractual provision by refusing to sustain a Court of Claims decision which set aside such findings.

In many respects the result reached by the Supreme Court was unsatisfactory to both the Government and to contractors with the United States and it was generally agreed that a greater scope of appeal should be granted through revision of the disputes clauses in both construction and procurement contracts. It was felt by most persons well informed in the field that there should be permitted, as there was before the Wunderlich case, appeals in cases involving actions which were either arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith. With this in mind, there was promulgated, under date of September 15, 1952, by amendment to the Armed Services Procurement Regulations a revised disputes clause for inclusion in all Department of Defense procurement and construction contracts which provided in part as follows:

"* * * any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the contracting officer, who shall * * * furnish a copy thereof to the contractor. Within 30 days * * * the contractor may appeal * * * to the Secretary, and the decision of the Secretary * * * shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive."

The Wunderlich case was decided by the Supreme Court on November 26, 1951. The same considerations which prompted the Department of Defense to reexamine the dispute clause were brought to the attention of the Congress and legislation was introduced similar to H. R. 1839 in the form of S. 2487, 82d Congress. Hearings were held and the Department of Defense took the position that the result sought to be reached could be easily accomplished by amendment to the disputes clause in the contracts and that legislation was not necessary. S. 2487 was not enacted. Subsequently by general provision (sec. 635) of the Department of Defense Appropriation Act, 1953, the Congress enacted the following:

"No funds contained in this act shall be used for the purpose of entering into contracts containing article 15 of the standard Government contract until and unless said article is revised and amended to provide an appeal by the contractor to the Court of Claims within 90 days of the date of decision by the Department concerned, authority for which appeal is hereby granted."

Thus, Congress denied the Department of Defense funds for entering into construction contracts containing a provision such as the one around which the litigation in the Wunderlich case revolved until such time as the provision was amended. It should be noted that article 15 appears only in the standard Government construction contract; thus, section 635 does not limit the availability of funds for other contracts. (See opinion of the Comptroller General B112 635, November 7, 1952.) By enactment of section 635 the Congress clearly recognized, by requiring amendment of article 15 to provide for appeals, that the matter was

one which could and should be handled through a revision of the contracts rather than through a general legislative enactment nullifying the effect of voluntarily assumed contractual obligations.

The September 15, 1952, amendment to the Armed Services Procurement Regulation, quoted above, was broader in its effect than section 635 of the Department of Defense Appropriation Act; it applies to all Department of Defense procurement and construction contracts and has for its legal basis the construction put on dispute clauses by the courts prior to the Wunderlich decision—a basis clearly recognized by the Congress in the enactment of 635.

Under procedures effective within the Department of Defense the Secretaries of the Army, Navy, and Air Force have, by joint action, created the Armed Services Board of Contract Appeals which acts for all 3 military services and provides objective panels to which the 3 military secretaries delegate the exercise of their power to review decisions under disputes clauses. The Board is governed by a charter and rules which have been published in the Federal Register and furnishes an efficient, fair, and expeditious method of administrative review of disputes to the satisfaction of both industry and the Government. It provides the degree of finality that is so essential in contractual matters. Approximately 50 percent of its decisions have been in favor of the contractors. Other executive departments have adopted comparable procedures, taking into account the size of the agency and the type and volume of their contracting work.

It is clear from the foregoing that legislation such as H. R. 1839 is not necessary to provide fair and expeditious settlement of factual disputes arising under Government contracts. As an agency of the Government the Department of Defense keeps these matters under constant surveillance and, under the state of the law as it now exists, Government agencies can, as circumstances dictate, adapt their disputes clauses to the varying and shifting needs of the Government and of the contractors with the Government.

The bill, H. R. 1839, adds an additional factor which would complicate the efforts of the Department of Defense and other executive agencies in obtaining the maximum degree of finality under its contracts. That is the provision which would apparently permit the General Accounting Office to render the disputes clause in any contract void, by making a finding to the effect that an administrative decision was "fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence." The General Accounting Office has, of course, general authority to review fiscal transactions of Government agencies, including contractual obligations and disbursements thereunder. However, in cases in which the contract contains a disputes clause and that clause has been utilized to secure a final administrative determination of fact, no further review by other agencies is required.

This bill would seem to authorize a new and additional review by the General Accounting Office of actions taken under dispute clauses. Assuming that that office would adopt liberal policies and procedures in clearing the decisions of the agencies under the clauses by a policy of endorsing those findings when they are supported by any reliable, probative, and substantial evidence, it nevertheless would appear that the delays and expense incurred by channeling disputes of all executive agencies through any one agency would negate the value of such additional review.

As discussed above, the Armed Services Board of Contract Appeals has performed in a satisfactory fashion for both the Government and for industry. It is our understanding that this has also been true of the work of other agencies under similar appeals procedures. The Department of Defense believes that executive agencies can continue to so function under revised disputes clauses such as that set forth above.

To superimpose General Accounting Office review on existing disputes clause procedures would not only create a completely new review, it would, as a practical matter, eliminate the usefulness of the disputes clauses themselves by destroying the concept of finality and dividing the responsibility for determining the merits of any given appeal. Undoubtedly, this would generate protracted and expensive disagreements among Government agencies, the General Accounting Office and contractors representatives. This would defeat the aims of both the Government and its contractors by making it impossible to accomplish the very purposes of the disputes clause; i. e., the achievement of proper and expeditious performance of contracts.

The Department of Defense has no objection to the enactment of section 2 of this legislation in that it merely codifies into statutory form existing and sound principles of law.

In view of the foregoing, it is recommended that H. R. 1839 not be enacted.

In view of the great impact on its operations that enactment of H. R. 1839 would have, the Department of Defense would appreciate an opportunity to be heard in this matter. I will personally be available to testify at your convenience.

In view of the urgency of your request, this report has not been submitted to the Bureau of the Budget for advice as to the relationship of H. R. 1839 to the program of the President.

Sincerely yours,

ROGER KENT,
General Counsel.

OFFICE OF THE SECRETARY OF DEFENSE,
Washington 25, D. C., June 13, 1953.

Hon. CHAUNCEY W. REED,
Chairman of the Committee on the Judiciary,
House of Representatives

DEAR MR. CHAIRMAN: The Department of Defense has noted the passage by the Senate of S. 24, which deals with the matter of review of decisions of Government contracting officers on disputed questions of fact arising under Government contracts.

You will recall that in response to requests from your committee, this Department commented upon H. R. 1839, which is identical to S. 24 and H. R. 3634, by letters dated February 21, 1953, and April 28, 1953, respectively. In those letters, the Department of Defense stated, in substance, that it believed legislation in this area was unnecessary, but that if the Congress should conclude that legislation was desirable, the Department recommended that it substantially follow the provisions of the Armed Services Procurement Regulations dealing with disputes clauses, issued on September 15, 1952. It was noted that H. R. 3634 would not appear to be objectionable, since that bill, in essence, restates the grounds for appeal from disputes clauses which prevailed prior to the Wunderlich decision and which apply under the Armed Services Procurement Regulations. In this connection there is also attached, for the convenience of your committee, draft language which it is believed would be equally satisfactory.

The Department of Defense has a substantial interest in any proposed legislation which may seriously affect its ability to assure proper and expeditious performance of contracts vital to the national security. As outlined in the above-mentioned letters to your committee, this Department is deeply concerned about the probable adverse impact upon contractual operations which would result from legislation such as S. 24. Unfortunately, this Department was not afforded an opportunity to present its views as to S. 24 during the consideration of that bill by the Senate Judiciary Committee, and first became aware of committee action when the bill appeared on the Senate calendar with a favorable committee report.

In view of the importance of this matter, it is respectfully requested that in the event the Committee on the Judiciary decides to act on S. 24, or on either of the above referred to bills, H. R. 1839 or H. R. 3634, the Department of Defense be afforded an opportunity to present its position with respect thereto.

Sincerely yours,

J. G. ADAMS, *General Counsel Acting.*

"*Be it enacted, etc.*, That any provision of any contract entered into by the United States to the effect that the decision of the head of the department or agency of the United States concerned, or his representative, shall be final and conclusive with respect to disputes involving questions of fact arising under the contract, shall be binding except as to such decisions hereafter made which may be determined by a court of competent jurisdiction to have been arbitrary, so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington 25, D. C., March 2, 1953.

Hon. CHAUNCEY W. REED,
Chairman, Committee on the Judiciary,
House of Representatives.

MY DEAR MR. CHAIRMAN: Reference is made to your letter of February 6, 1953, acknowledged by telephone February 10, requesting an expression of the views of this Office on H. R. 1839, 83d Congress, entitled, "A bill to permit

reviews of decisions of Government contracting officers involving questions of fact arising under Government contracts in cases other than those in which fraud is alleged, and for other purposes."

The bill is designed to overcome the inequitable effect, under a recent Supreme Court decision, of language in Government contracts which makes the decision of the contracting officer or head of the agency final with respect to questions of fact, and to prohibit the insertion of language making the decision of an administrative official final on questions of law. It is identical with S. 24, 83d Congress, which was favorably reported by the Senate Committee on the Judiciary in report No. 32 dated February 4, 1953, and with a bill of the 82d Congress, S. 2487, which passed the Senate unanimously but was approved by that body too late in the second session for further action in the House.

It has been customary for Government agencies to insert in Government contracts a clause relating to disputes similar to article 15 contained in the standard form construction contract, which reads as follows:

"Article 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

In the past, questions of fact decided in accordance with the provisions of a clause such as the above were not disturbed by the General Accounting Office or the courts unless the action of the administrative officer was fraudulent, arbitrary, capricious, or so grossly erroneous as to imply bad faith. However, in the case of *United States* v. *Wunderlich* (342 U. S. 98), decided November 26, 1951, the Supreme Court held that under such a contract provision the decision of the deciding official on a question of fact remains final "unless it was founded on fraud, alleged and proved." In this connection, the Court stated that "fraud is in essence the exception. By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract. The Court went on to say that:

"If the decision of the department head under article 15 is to be set aside for fraud, fraud should be alleged and proved, as it is never presumed. * * * The finding of the Court of Claims was that the decision of the department head was 'arbitrary,' 'capricious,' and 'grossly erroneous.' But these words are not the equivalent of fraud * * *. The limitation upon this arbitral process is fraud, placed there by this Court."

It is significant that the court went further to state, possibly as an invitation but certainly as indicating a remedy, that "If the standard of fraud that we adhere to is too limited, that is a matter for Congress." In two strong dissenting opinions it was pointed out that the rule announced by the Court has wide application and could have a devastating effect as it grants unlimited power to contracting officials and makes it possible for them to be negligent, to disregard evidence and to shield their departments from the consequences of their own irregularities or blunders at the expense of the contractor. Those opinions concern themselves with the fact that the decision places contractors at the mercy of the deciding officials even though their decisions may be perverse, captious, incompetent or palpably erroneous. This Office is as deeply concerned, however, that the rule allows the contracting officials uncontrolled discretion over the Government's contractual affairs as well and places them in a position to make as arbitrary and reckless use of their power against the interests of the Government as against the interests of the contractor. In other words, deciding officials can make just as arbitrary determinations in favor of contractors at the expense of the taxpayers.

Of perhaps more serious consequences is the increasing tendency on the part of some executive contracting agencies to include in Government contracts a provision specifying that all disputes, whether of law or fact, are to be finally and conclusively settled administratively, rather than by the accounting officers or the courts. The validity of an "all disputes" clause of that nature was upheld by the Supreme Court in the case of *United States* v. *Moorman* (338 U. S. 457). Speaking of such provisions the Court stated that "No congressional enactment condemns their creation or enforcement" and that "If parties competent to

decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of the Government." Manifestly it is unwise to leave determinations of questions of law to administrative officials.

H. R. 1839 will have the effect of permitting review in the General Accounting Office or a court with respect to any decision of a contracting officer or head of an agency which is found to be fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence. Also, it will put an end to the practice of including in Government contracts provisions authorizing questions of law to be finally decided administratively. Thus, the General Accounting Office will be in a better position to perform the functions delegated to it under the Budget and Accounting Act of 1921 (42 Stat. 24), and the Budget and Accounting Procedures Act of 1950 (31 U. S. C. A. sec. 2, et seq.), namely, to examine and audit the financial transactions of the Government and settle and adjust all claims and accounts by and against the United States, or in which the United States is concerned. Also, the courts will be left free to grant corrective relief in proper cases.

However, attention is invited to section 635 of the Department of Defense Appropriation Act, 1953 (66 Stat. 537), which provides as follows:

"SEC. 635. No funds contained in this Act shall be used for the purpose of entering into contracts containing article 15 of the Standard Government Contract until and unless said article is revised and amended to provide an appeal by the contractor to the Court of Claims within ninety days of the date of decision by the Department concerned, authority for which appeal is hereby granted."

That section, in requiring that the contractor be given an unconditional right to appeal to the Court of Claims within 90 days of the date of decision by the department concerned, appears to conflict, to some extent, with the provisions of H. R. 1839. Hence, if the proposed legislation is to become law prior to June 30, 1953, the date when the provisions of section 635 will automatically lapse, it is recommended that provision be made in the present bill for the repeal of said section by adding a concluding paragraph thereto reading as follows:

SEC. 3. Section 635 of the Department of Defense Appropriation Act, 1953 (66 Stat. 537), is hereby repealed.

For the foregoing reasons, this Office strongly recommends the enactment of the proposed legislation, amended as above. A report was made to the Committee on the Judiciary of the 82d Congress under date of April 21, 1952, B-107871, on H. R. 6214, H. R. 6301, H. R. 6338, and H. R. 6404, which were introduced therein, involving similar legislation on this subject.

Sincerely yours,

LINDSAY C. WARREN,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, December 30, 1953.

Hon. CHAUNCEY W. REED,
Committee on the Judiciary,
House of Representatives.

MY DEAR MR. CHAIRMAN: On June 8, 1953, the Senate passed S. 24, the companion bill to H. R. 1839, now pending in the House and under consideration by your committee. Both bills are designed to permit review by the General Accounting Office and the courts of certain decisions of Government contracting officers involving questions of fact arising under Government contracts and to prohibit the use of a contract provision making final, on a question of law, the decision of any administrative official, representative or board.

As you know, there was considerable opposition to the bill from some quarters either on the basis (1) that legislation was not necessary or (2) that the General Accounting Office should not be given express authority by statute to review and overrule the determinations of administrative officials.

With respect to the first-mentioned basis of opposition there may be cited section 632 of the Department of Defense Appropriation Act, 1954, Public Law 179, approved August 1, 1953 (67 Stat. 356), which provides as follows:

"No funds contained in this Act shall be used for the purpose of entering into contracts containing article 15 of the Standard Government Contract until and

unless said article is revised and amended to provide an appeal by the contractor to the Court of Claims within ninety days of the date of decision by the Department concerned, authority for which appeal is hereby granted."

This obviously is insufficient to accomplish the purposes of S. 24 and H. R. 1839 for three important reasons. First, it is effective only during the current fiscal year and applies only to construction contracts financed out of that appropriation act. Second, it does not affect the authority of administrative officials to finally determine questions of law under contracts. And third, it provides for appeal only by the contractor and does not protect the Government where the administrative decision may be prejudicial to the interests of the Government.

As another basis for urging that legislation is not required it is stated that the matter may be corrected by administrative regulations or contract provisions. This is an entirely unsatisfactory solution because those regulations or contract provisions could be changed, at will, by the authority which prescribes or prepares them. It should be noted that present regulations provide a one-way street—resort to the courts where the contractor is dissatisfied or adversely affected but not where the Government is prejudiced. Furthermore, they do not affect the authority of administrative officials to finally determine matters of law.

With respect to the second mentioned basis of opposition to the pending bills it should be pointed out that the General Accounting Office has not asked for authority which it did not have before the decision in the Wunderlich case. This was made clear in the testimony of representatives of this Office before the Senate subcommittee which held hearings on the somewhat similar bill S. 2487. In this connection see the committee report on S. 24 (S. Rept. 32) wherein it is stated:

"The committee wishes to point out with respect to the language contained in the bill, 'in the General Accounting Office or a court, having jurisdiction,' that it is not intended to narrow or restrict or change in any way the present jurisdiction of the General Accounting Office, either in the course of a settlement or upon audit; that the language in question is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has."

That was and is precisely the position of the General Accounting Office.

Since the end of the past session of Congress this Office has given the matter further consideration and the subject has been discussed with various administrative officials and representatives of industry. As a result a substitute draft of a bill has been developed as follows:

"AN ACT To permit review of decisions of the heads of departments, or their representatives or boards, involving questions arising under Government contracts.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"SEC. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative or board."

We have reason to believe that should the Congress decide to enact legislation on this subject there would be no opposition to this substitute language by various representatives of industry groups, including The Associated General Contractors of America, Inc., the Aircraft Industries Association of America, Inc., and the Radio-Electronics-Television Manufacturers Association. And representatives of interested administrative agencies have indicated to us that while they believe no legislation is necessary there probably would be little or no opposition to the particular language of this substitute draft. In my judgment this substitute language will accomplish what we have been striving for all along and will place the General Accounting Office in precisely the same situation it was in before the decisions in the Wunderlich and Moorman cases.

For the reasons indicated above, and in the belief that there might be little difficulty in obtaining the enactment thereof, I strongly recommend that the draft bill quoted herein be substituted for S. 24 and H. R. 1839 and that action thereon be taken at an early date. Representatives of this Office will be available to discuss the matter with you or members of your staff at any time should you so desire.

Sincerely yours,

LINDSAY WARREN,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, June 11, 1953.

Hon. CHAUNCEY W. REED,
Chairman, Committee on the Judiciary,
House of Representatives.

MY DEAR MR. CHAIRMAN: I see from the Congressional Record of June 8, 1953, pages 6375–6, 6402, and 6406, that the Senate has passed S. 24, the companion bill to H. R. 1839, now pending in the House and under consideration by your committee, which is designed to permit review by the General Accounting Office and the courts of certain decisions of Government contracting officers involving questions of fact arising under Government contracts.

I consider the enactment of the legislation provided for in H. R. 1839 extremely important for the reasons stated in my report to you dated March 2, 1953. And as indicated in the letter of May 13, 1953, with particular reference to H. R. 3634, 83d Congress, it is believed that, of the bills which have been introduced dealing with legislation on this general subject, H. R. 1839 and S. 24 are the only bills which will adequately protect the interest of the Government, as well as contractors doing business with the Government. Now that the Senate has acted favorably on the companion bill S. 24, may I respectfully urge that you take such action as may be necessary to insure that the bill will be reported out in time for action to be taken in the House at this session.

Representatives of this office will be glad to confer with you or your staff on this matter at your convenience.

Sincerely yours,

LINDSAY C. WARREN,
Comptroller General of the United States.

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, July 28, 1953.

Hon. CHAUNCEY W. REED,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: This communication is submitted in response to your request for the views of the Department of Justice relative to the bills H. R. 1839 and S. 24, both "To permit review of decisions of Government contracting officers involving questions of fact arising under Government contracts in cases other than those in which fraud is alleged, and for other purposes."

S. 24 was passed by the Senate on June 8, 1953, and, as passed, contains language identical to H. R. 1839. These bills, in the view of this Department, would radically alter the legal effect, first announced by the Supreme Court in 1878, and in numerous cases thereafter up to and including its decision in *United States* v. *Wunderlich* (342 U. S. 98), to be given to contractual provisions incorporated in Government contracts vesting arbitral powers to resolve disputes arising under such contracts in a representative or representatives of one of the contracting parties.

The most recent form which such contractual provisions have taken in Government contracts is exemplified by article 15 of the standard form Government construction contract which, with modifications not here pertinent, has been employed almost universally in such contracts for almost 30 years. That article covers disputes arising between the contractor and the Government under the contract in question concerning questions of fact. It provides further that such questions shall be originally determined by the contracting officer but that his

decision shall he subject to written appeal hy the contractor within 30 days to the head of the department concerned or his duly authorized representative whose decision of the dispute "shall be final and conclusive upon the parties thereto."

The historical development of judicial construction of provisions such as those above summarized are more fully traced in statements made by representatives of the Department of Justice in hearings before a subcommittee of the Senate Committee on the Judiciary (82d Cong., 2d sess.) on S. 2487. We respectfully refer the committee to such statements (see print (APO 1952) of hearings on S. 2487, pp. 13–21, 110–113) for the reasons which may he advanced for continuing without legislative impairment the effectiveness of such provisions at least insofar as they are incorporated in contracts now in existence.

The apparent effect of enactment of either S. 24 or H. R. 1839 would be to divest from the decision of the head of the department concerned, which is rendered in response to an appeal hy a contractor under article 15, that degree of finality and conclusiveness now afforded it under the terms of the article and the decisions of the Supreme Court. Under existing law such a decision is final and conclusive unless the contractor is able to allege and prove in a court of competent jurisdiction that the decision was the result of fraud or was so grossly erroneous as necessarily to imply bad faith. See, e. g., *Kihlberg* v. *United States* (97 U. S. 398–401 (1878)); *Martinsburg & Potomac R. R. Co.* v. *March* (114 U. S. 549, 553 (1884)); *Ripley* v. *United States* (223 U. S. 701 (1912)); *United States* v. *Moorman* (338 U. S. 457–461 (1950)); *United States* v. *Wunderlich* (342 U. S. 98 (1951)). S. 24, upon enactment could, however, be construed as providing for a nearly de novo review in the Court of Claims (or in a district court where the amount in controversy does not exceed $10,000) of the decision of the "head of the department concerned." See pp. 2–3 of the Senate Committee Report on S. 24 (S. Rept. No. 32, 83d Cong., 1st sess.).

Such a construction would rob article 15 and like existing contractural agreements of their manifest purpose which is to provide a relatively speedy and inexpensive method of equitably resolving the numerous technical, factual disputes which almost inevitably arise in the performance of contracts of considerable magnitude. In weighing the merit of this proposed legislation, therefore, we believe that the committee must give consideration to the fact that either bill, if enacted, will in effect constitute an open invitation to further expensive, time-consuming litigation. It also remains an open question in the light of the heavy additional expense entailed and the concomitant utilization of the time of Government experts and attorneys, whether the Court of Claims is in a relatively better position to resolve such factual disputes than, for instance, such specialized, expert bodies as the former War Department Board of Contract Appeals. See quoted material appearing at page 15 of the hearings on S. 2487.

Despite the persistence of these questions first raised in connection with S. 2487 of the 82d Congress, we desire to point out that S. 24 and H. R. 1839 differ significantly from the former bill in one respect. Under the present bills, certain jurisdiction is vested in the General Accounting Office, whereas former S. 2487 did not make mention of that Agency. This additional provision calls for a revision of certain of the remarks made at the hearings last year.

It was there pointed out that a broadening of the scope of review permitted the Court of Claims under the Wunderlich and prior decisions would leave available to the contractor at least three successive authorities to pass on a disputed question of fact arising under the terms of article 15 of the standard Government form contract—i. e., the contracting officer, the head of the agency concerned, and, to a far broader extent than heretofore, the Court of Claims.

In contrast, however, to these numerous appeal rights the Government would have apparently been bound by the terms of article 15 to accept the ruling of the contracting officer without further recourse because that article provides that the decision of the contracting officer shall be final and conclusive unless "a written appeal [is filed] *by the* contractor within 30 days to the head of the Department concerned * * *". That the General Accounting Office cannot presently, under such a contractual provision, overrule a decision of the contracting officer is suggested in the following cases: *Leeds & Northrup Co.* v. *United States* (101 F. Supp. 999 (E. D. Pa. 1951)); *Graham* v. *United States* (91 F. Supp. 715 (N. D. Cal. 1950)); *McShain & Co.* v. *United States* (83 C. Cl. 405 (1936)); *United States* v. *Mason and Hanger Co.* (260 U. S. 323 (1922)).

The bills under discussion, if enacted in their present form, are, however, apparently designed to vest in the General Accounting Office powers of review

over decisions made within the purview of article 15 which, as shown, are probably nonexistent under article 15 as presently interpreted. If, therefore, the present state of the law in respect of finality clauses is to be changed, the provision relating to the General Accounting Office will afford some degree of balance. By virtue of this provision the Government may be afforded a modicum of protection, heretofore lacking, against decisions of contracting officers which are unduly favorable to contractors or are entered into in collusion with such contractors. Such decisions, of course, would not under the present scheme be appealed by contractors and hence might stand without further scrutiny.

Whether, upon passage of either of these bills, the General Accounting Office would then be faced with the problem of reviewing all of the decisions of a contracting officer concerning disputed questions of fact which may have arisen, for instance, during the performance of a large construction contract, is a question this Department cannot answer. If so, the cost of the operation might equal or even exceed the additional litigation expenses which will ensue by reason of the broadened scope of court review proposed in S. 24 or H. R. 1839. As stated, article 15 represents, of course, an attempt to curtail expensive and time-consuming litigation. By its inclusion as a contractual clause, the Government abandoned any right of appeal from the contracting officer's decision in return for the contractor's agreement that, absent fraud or gross error necessarily inplying fraud, it would be bound by the results of a bona fide, good faith review by the head of the department concerned.

We are advised that article 15 has been incorporated in many existing but as yet incompletely performed Government contracts. The Department of Justice is opposed to the impairment of the Government's contractual rights as so established. It would not, however, have objection to legislation which would forbid the further incorporation of article 15 provisions in future contracts. If, however, the presently proposed legislation is to be enacted, we believe that retention of the provisions respecting the Comptroller General is most advisable.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

WILLIAM P. ROGERS,
Deputy Attorney General.

OFFICE OF THE SECRETARY OF DEFENSE,
Washington 25, D. C., April 28, 1953.

Hon. CHAUNCEY W. REED,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: This will reply to your recent request for the views of the Department of Defense with respect to H. R. 3634, a bill to amend title 28 of the United States Code so as to provide for a limited judicial review of decisions of Federal officers under "finality clauses" in Government contracts.

H. R. 3634 would apply to cases before the Court of Claims or a district court founded upon contracts with the United States which contain a provision making the administrative decision of a Federal officer final and conclusive with respect to disputed questions of fact. The bill would provide that the courts may decide such cases without regard to the finality of those administrative decisions which it finds were founded on fraud, or involved such gross mistake as necessarily implied bad faith or were arbitrary or capricious. The bill would not apply to administrative decisions which became final more than 1 year prior to date of enactment.

As set forth in a letter to your committee dated February 21, 1953, commenting upon H. R. 1839 which also deals with the matter of "disputes clauses" in Government contracts, the Department of Defense does not believe that legislation relating to such clauses is necessary to provide fair and expeditious settlement of factual disputes arising under Government contracts. That letter reviewed comprehensively the history of the utilization of "disputes clauses" in Government contracts, the problem which arose as a result of the Supreme Court decision in the Wunderlich case, and set forth in detail the reasons why this Department feels that no legislation in this area is required. Accordingly, it is not deemed appropriate here to repeat such detailed material. This Department believes that the amendment of September 15, 1952, to the Armed Services Pro-

curement Regulations has eliminated the problem which stemmed from the Wunderlich decision. In the 7 months that this revised clause has been in effect, insofar as we have been able to ascertain, it has proved eminently satisfactory from the standpoint of both the Government and its contractors.

Under the law now existing, all Government agencies can easily adapt their disputes clauses to the varying and shifting needs of the Government and its contractors as circumstances may dictate, and it is believed that such flexibility is advantageous to both the Government and the contractors.

If the Congress should nevertheless conclude that limitations upon the finality of decisions under such disputes clauses should be spelled out in legislation, it is respectfully submitted that the grounds for review of such decisions by a court of competent jurisdiction should be as set forth in the earlier referred to amendment to the Armed Services Procurement Regulations issued by this Department on September 15, 1952. Considered in this light H. R. 3634 would not be objectionable since it would, in substance, restate the grounds for appeal from disputes clauses which prevailed prior to the Wunderlich decision and which apply under the revised Armed Services Procurement Regulations.

In view of the urgency of your request, this report has not been submitted to the Bureau of the Budget for advice as to the relationship of H. R. 3634 to the program of the President.

Sincerely yours,

ROGER KENT, *General Counsel.*

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D. C., May 13, 1953.

Hon. CHAUNCEY W. REED,
Chairman, Committee on the Judiciary,
House of Representatives.

MY DEAR MR. CHAIRMAN: Reference is made to your letter of April 10, 1953, acknowledged by telephone April 13, requesting an expression of the views of this office on H. R. 3634, 83d Congress, entitled "A bill to amend title 28 of the United States Code so as to provide for a limited judicial review of decisions of Federal officers under 'finality clauses' in Government contracts."

The bill is designed to permit review in the Court of Claims, or any district court, of decisions of administrative officers relating to questions of fact made pursuant to finality clauses in Government contracts in cases where it is determined that the decision was "founded on fraud, or involved such gross mistake as necessarily implied bad faith, or was arbitrary or capricious." It is identical with a bill of the 82d Congress, H. R. 6214, on which this office submitted a report to the former chairman of the House Judiciary Committee on April 21, 1952. A copy of such report is furnished herewith for your convenience. As indicated therein, this office considers a bill such as H. R. 6214 and H. R. 3634 inadequate and objectionable because no provision is made therein for a review of decisions of administrative officers by the General Accounting Office. Without a provision to that effect, the General Accounting Office, in performing its statutory functions, would be precluded from questioning the propriety or legality of payments made to a contractor as the result of an arbitrary or grossly erroneous decision on the part of the contracting officer. In contrast, if provisions similar to those contained in H. R. 1839, 83d Congress, on which this office submitted a report to you March 2, 1953, and in S. 24, 83d Congress, referred to therein, are enacted into law, not only would a contractor be protected against fraudulent, arbitrary or capricious action, but the Government, through the General Accounting Office, would be protected against decisions adverse to the interest of the United States. It is believed that the public interest requires that the rights of contractors and the Government to review or appeal should be coextensive.

Furthermore, H. R. 3634, unlike the other bills, contains no prohibition against the insertion in Government contracts of clauses authorizing questions of law to be finally decided administratively. For the reasons indicated in the referred-to report of March 2, 1953, this office considers such a provision essential.

Sincerely yours,

LINDSAY C. WARREN,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington 25, D. C., April 21, 1952.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary, House of Representatives.

MY DEAR MR. CHAIRMAN: Further reference is made to your letters of March 21, 1952, acknowledged by telephone March 26, requesting an expression of my views on H. R. 6214, H. R. 6301, H. R. 6338, and H. R. 6404, 82d Congress.

Each of the bills is designed to permit judicial review of decisions of administrative officers made pursuant to so-called finality clauses in Government contracts in cases where the decision is found to be either arbitrary, capricious, or grossly erroneous. The subject of finality of administrative and departmental decisions under Government contracts is of vital importance to the General Accounting Office, particularly insofar as it tends to limit the jurisdiction of this Office and of the Courts.

The Budget and Accounting Act, 1921 (42 Stat. 24), and the Budget and Accounting Procedures Act of 1950 (Public Law 784) approved September 12, 1950, vest authority in the Comptroller General of the United States, as the agent of the Congress, to examine and audit the financial transactions of the Government. By section 305 of the earlier act, Congress provided that claims by and against the United States and all accounts whatever in which the Government of the United States is concerned shall be settled and adjusted in the General Accounting Office.

It has generally been regarded, by force of the terms of these statutes, that payments made by public officers in the transaction of the Government's business were subject to a determination by the General Accounting Office, as to the legal propriety thereof—that such payments were not final until settled by the General Accounting Office. Accordingly, in transactions involving an expenditure of public funds the General Accounting Office has determined the actual conditions underlying the terms of any contractual agreement and if, upon the facts developed, it appeared that a contractor had been unjustly enriched at the public expense, the General Accounting Office would take the necessary action to recover any amount overpaid. By the same token, a contractor who felt he was entitled to an additional amount under a contract could present a claim to the General Accounting Office for settlement, irrespective of the administrative action taken in the matter. This authority must exist consistent with the directions in section 305 of the act, supra, that all accounts and claims shall be adjusted and settled in the General Accounting Office. This is precisely the same authority heretofore exercised by the courts and, of course, contractors have a right of appeal to the courts from the determinations of the General Accounting Office.

Broadly speaking, questions arising out of Government contracts are of two types, (*a*) those of fact, and (*b*) those of law. Not infrequently however, disputes arise involving mixed questions of law and fact. It has been customary in Government contracts to provide that all disputes concerning questions of fact arising under the contract shall be decided by the contracting officer whose decision shall be final and conclusive between the parties subject to the right of the contractor to appeal to the head of the agency concerned within a limited period of time. The usual provision is that contained in article 15 of the standard form Government contract, as follows:

Article 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

In the past, questions of fact so decided were not disturbed by the General Accounting Office or the courts unless the action of the administrative officer was fraudulent, arbitrary, capricious, grossly erroneous, or without foundation in fact. Administrative finality on questions of fact can be a useful device leading to the reasonably satisfactory settlement of many contractual controversies. The majority of questions so determined concern quantity and quality of materials delivered, whether the work performed meets the specifications, causes of delay in performance, and like matters of fact. Solution thereof in many cases depends on highly specialized, technical, or professional knowledge

or skill. On that basis, final determinations of such matters, reasonably and honestly arrived at by the department making the contract, generally were not questioned by the General Accounting Office or the courts.

However, in the recent case of *United States* v. *Wunderlich* (342 U. S. 98) decided November 26, 1951, the Supreme Court held that under such contract provision the decision of the deciding official on a question of fact remains final "unless it was founded on fraud, alleged and proved." In this regard the Court stated that "fraud is in essence the exception. By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract." The Court went on to say that "If the conclusiveness of the findings under article 15 is to be set aside for fraud, fraud should be alleged and proved, as it is never presumed. * * *. The findings of the Court of Claims was that the decision of the department head was 'arbitrary,' 'capricious,' and 'grossly erroneous.' But these words are not the equivalent of fraud * * *. The limitation upon this arbitral process is fraud, placed there by this Court." It is significant that the Court went further to state, possibly as an invitation but certainly as indicating a remedy, that "If the standard of fraud that we adhere to is too limited, that is a matter for Congress." In two strong dissenting opinions it was pointed out that the rule announced by the Court has wide application and could have a devastating effect as it grants unlimited power to contracting officials and makes it possible for them to be negligent, to disregard evidence, and to shield their departments from the consequences of their own irregularities or blunders at the expense of the contractor. Those opinions concern themselves with the fact that the decision places contractors at the mercy of the deciding officials even though their decisions may be perverse, captious, incompetent, or palpably erroneous. I am as deeply concerned, however, that the rule allows the contracting officials uncontrolled discretion over the Government's contractual affairs as well and places them in a position to make as arbitrary and reckless use of their power against the interests of the Government as against the interests of the contractor. In other words, deciding officials can make just as arbitrary determinations in favor of contractors, at the expense of the taxpayers.

Of perhaps more serious consequence, however, is the increasing tendency on the part of some executive contracting agencies to include in Government contracts a provision specifying that all disputes, whether of law or fact, are to be finally and conclusively settled administratively, rather than by the accounting officers or the courts. The validity of an all-disputes clause of that nature was upheld by the Supreme Court in the case of *United States* v. *Moorman* (338 U. S. 457). Speaking of such provisions the Court stated that "No congressional enactment condemns their creation or enforcement" but that "If parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of Government." But again, as was the case with the "disputed questions of fact" provision, prior to the decision of the Supreme Court in the Wunderlich case, supra, the courts had been understood to have qualified the all-disputes provisions by requiring that the administrative decision, in order to be conclusive, must be made in good faith and not be arbitrary or capricious.

Applying the rationale of the Supreme Court's decisions in the Wunderlich and Moorman cases, supra, it appears that the contracting agencies without specific legislation authorizing them to do so, may, by agreement with the contractor, circumvent the operations of courts and the General Accounting Office to the serious detriment of both private business and the Government. Thus, the rule now made clear by the Supreme Court could result not only in depriving the Congress of the normal safeguards inherent in an audit by the General Accounting Office of public expenditures but also could preclude contractors of their usual remedy to pursue claims before the General Accounting Office. Manifestly, this unique position now enjoyed by the contracting agencies is contrary to the established policies of our Government and represents an unwarranted encroachment upon the control by the Congress over public expenditures. It is imperative, considering the billions of dollars now being spent under contracts, that there be enacted legislation limiting this final authority the contracting agencies have taken upon themselves by the use of "finality clauses" in contracts.

Since it has been the policy of our system of Government to afford an independent review of administrative expenditures by the accounting officers, I strongly recommend that the Congress enact legislation limiting the final authority of contracting officials to decisions on questions of fact, subject, however, to review by the General Accounting Office or the courts in cases where the decision is found to be fraudulent, arbitrary, grossly erroneous, or not supported by the facts.

Each of the subject bills, as introduced, is considered by this Office as inadequate and is objectionable because no provision is made therein for a review of decisions of administrative officers by the Government, through the General Accounting Office. Without a provision to that effect the General Accounting Office in performing its statutory functions would be precluded from questioning the propriety or legality of payments made to a contractor as the result of an arbitrary or grossly erroneous decision on the part of the contracting officer. Furthermore, it is the view of the General Accounting Office that any legislation concerning the matter should contain language prohibiting the contracting agencies from including a clause in a contract purporting to make the decision of the administrative officers final and conclusive on questions of law. Also, with the exception of H. R. 6214 and H. R. 6301, it is not clear whether the bills are intended to be effective with respect to current contracts or only to those contracts executed after the enactment of the legislation. In that connection H. R. 6301 would be effective as to contracts entered into on or before November 26, 1951, subject to certain limitations specified therein, and as to contracts entered into after enactment of the proposed legislation. There is however, no provision made therein as to its applicability to those contracts entered into between November 26, 1951, and the date of the enactment of the bill. Consequently, it appears that if the bill is to be favorably considered it should be amended so as to be applicable to those contracts.

Bill H. R. 6404 is apparently intended solely as an amendment to section 10 of the Administrative Procedure Act (60 Stat. 237). However, the bill as presently drafted might be viewed as repealing the remaining sections of that act.

It is understood that one of the witnesses who appeared on behalf of certain private contractors before a subcommittee of the Senate Committee on the Judiciary, in connection with a hearing on S. 2487 on the same subject, has submitted two proposals containing language as follows:

PROPOSAL NO. 1

"That in any suit based upon any contract heretofore entered into by the United States, the United States shall not employ as a defense the finality of the decision of any officer, board or other representative of the executive branch of the United States on any disputed question arising under the contract.

"SEC. 2. No contract hereafter entered into by the United States shall contain, nor shall the jurisdiction of the United States Court of Claims (or of the United States district courts within the limits presently prescribed) to hear, determine, and enter judgment upon any claims arising out of such a contract be restricted by, any provision making the decision of any officer, board or other representative of the executive branch of the United States final and conclusive upon disputed questions arising under the contract.

"SEC. 3. The authority of the Comptroller General of the United States to pass upon the validity of an expenditure of public funds or to settle and adjust a claim by or against the United States shall not be impaired by any provision of a contract with the United States."

PROPOSAL NO. 2

"That if in any suit against the United States based upon any contract heretofore entered into by the United States it shall be established that the decision of any officer, board or other representative of the executive branch of the United States on any disputed question arising under the contract was arbitrary, or capricious, or grossly erroneous, or not supported by substantial evidence, the United States shall not avail itself of the defense of the finality of such decision.

"SEC. 2. No contract hereafter entered into by the United States shall contain any provision making final on a question of law the decision of any officer, board or other representative of the executive branch of the United States, and

every such contract which may contain any provision making the decision of any such officer, board or other representative final upon disputed questions of fact shall contain a qualifying provision that such decision shall not be final if it is fraudulent, or arbitrary, or capricious, or grossly erroneous, or is not supported by substantial evidence.

"SEC. 3. The authority of the Comptroller General of the United States to pass upon the validity of an expenditure of public funds or to settle and adjust a claim by or against the United States shall not be impaired by any provision of a contract with the United States."

This Office has no particular objection to either of these proposals however, the first paragraph of both proposals relates to current or prior contracts and is for the benefit of contractors only. In other words, while the Government would be precluded from employing the finality of the administrative decision as a defense to a suit, the contractors would be free to utilize such defense should the accounting officers of the Government attempt to question the validity of a payment made to a contractor as the result of an arbitrary, capricious, or grossly erroneous decision. Furthermore, if the first paragraph were amended to also preclude the contractors from asserting as a defense the finality of the administrative decision, some question might be raised, perhaps with considerable merit, as to the constitutionality of enacting legislation of that character on the ground that it would impair the obligations of contracts or divest vested rights of the contractors. It thus would appear preferable to eliminate the first paragraph of the proposals or as an alternative method, the Congress might prefer to enact legislation requiring the departments to eliminate the "disputes clause" from contracts upon application by the contractors.

The General Accounting Office recommended to the Senate Committee on the Judiciary, in connection with S. 2487, that there be enacted a bill providing substantially as follows:

"No Government contract shall contain a provision making final on a question of law the decision of an administrative official, representative or board. Any stipulation in a Government contract to the effect that disputed questions shall be finally determined by an administrative official, representative or board shall not be treated as binding if the General Accounting Office or a court finds that the action of such officer, representative or board is either fraudulent, arbitrary, capricious, grossly erroneous, or that it is not supported by substantial evidence."

The General Accounting Office has no particular preference as to the language to be employed so long as the purposes indicated herein are accomplished. As to the two suggestions mentioned herein, designated as proposals Nos. 1 and 2, it is believed proposal No. 1 is preferable, subject to the comments made thereon. It is imperative, however, if the interests of contractors and the Government are to be adequately and fairly protected that legislation be enacted along the lines of those proposals, rather than the bills mentioned in the first paragraph hereof.

Sincerely yours,

LINDSAY C. WARREN,
Comptroller General, of the United States.

(The following communication was received subsequent to the public hearings)

THE SECRETARY OF COMMERCE,
Washington, January 28, 1954.

HON. CHAUNCEY W. REED,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: This letter is in reply to your request of September 10, 1953, for the views of this Department with respect to S. 24, an act to permit review of decisions of Government contracting officers involving questions of fact arising under Government contracts in cases other than those in which fraud is alleged, and for other purposes.

The act would have the effect of overturning the decision of the Supreme Court in *United States* v. *Wunderlich* (342 U. S. 98), in which it was held that the so-called "finality clause" usually included in Government contracts limited judicial review of determinations of the head of the contracting agency under such contracts to cases involving actual and proven fraud. S. 24 would allow review by courts of competent jurisdiction or the General Accounting Office of

the decision of the head of the agency if the decision is determined by the court or GAO to have been fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence.

This Department is of the opinion that the limitation of review prescribed by the Wunderlich case is so narrow as to be capable of effecting substantial injustices in individual cases, since all persons reviewing the case or claim are in the employ of the Government and, although actual fraud is not likely, arbitrary or capricious action may result from overzealous attempts to protect the Government's interests, to further the particular program, or otherwise. The Government might be the real beneficiary if the possibility of such injustices were eliminated, since bids might reflect a reduced reserve for this contingency. The Department therefore supports appropriate legislation to overturn the Wunderlich case.

However, S. 24 raises several questions which we wish to indicate as possible areas for consideration by your committee. These questions are as follows:

1. Should review be limited to questions of law, or should questions of mixed law and fact and questions of fact be reviewable?
2. Should review be limited to the courts or should GAO also have a right of review?
3. Should the Government have the right to seek review or should the contractor alone have the right to seek review?
4. Should the retroactive effect of such a statute be limited?
5. Should a time limit be specified within which the decision of the contracting agency must be appealed if review is to be had?
6. Should the standard "not supported by reliable, probative, and substantial evidence" be changed to "arbitrary or capricious"?
7. Could the matter best be solved by providing that a Government contract, either with or without a finality clause, shall be subject to arbitration under title IX of the United States Code if requested by either party? In this connection, we wish to point out that speedy and final settlement of disputes under Government contracts is of great importance to both Government and industry. The Department believes that these questions all are of sufficient merit to warrant consideration by your committee, although the exact method of dealing with these problems is one of policy for the Congress to decide. We suggest, however, that the Department of Justice, the General Accounting Office, and perhaps the Department of Defense and the General Services Administration, the largest contracting agencies in the Government, might be able to afford your committee some assistance with respect to the solution of these problems.

In an effort to bring to your committee as complete information as possible on this matter, the Department has undertaken to secure the views of industry with respect to this matter. Although industry appears to be overwhelmingly in favor of legislation to overturn the Wunderlich case, we have not been able to secure sufficient information with respect to the attitude of industry on the individual questions raised above to provide your committee with the views of industry in this regard or to enable us to select a procedure most appropriate for the purpose.

We have been advised by the Bureau of the Budget that it would interpose no objection to the submission of this letter.

If we can be of further assistance in this matter, please call on us.

Sincerely yours,

SINCLAIR WEEKS,
Secretary of Commerce.

Mr. FOLEY. And will the chairman leave the record open, up to and including February 4, for any corrections the witnesses may make and for testimony up to and including the 4th of February that may be received?

The CHAIRMAN. So ordered.

Mr. FOLEY. Thank you.

The CHAIRMAN. We will adjourn.

(Whereupon, at 2:50 p. m., Friday, January 22, 1954, the subcommittee was adjourned.)

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